2009

Sabrina Rahofy v. Lynn Steadman : Brief of Petitioner

Utah Court of Appeals

Lowell V. Smith; Trent D. Holgate; Smith & Glauser; Attorneys for Appellees.
Jamis M. Gardner; Thomas W. Seiler; Robinson, Seiler & Anderson; Attorneys for Respondent.

IN THE SUPREME COURT OF UTAH

SABRINA RAHOFY, an individual,	:	
	:	Court of Appeals Case No.
Plaintiff and Respondent,	:	20090512-CA
v.	:	
	:	Supreme Court No. 20110011-SC
LYNN STEADMAN, an individual, and	:	
STEADMAN LAND & LIVESTOCK, LLC	:	**Appeal from Opinion of the Utah**
	:	**Court of Appeals**
Defendants and Petitioners.	:	
	:	

BRIEF OF PETITIONERS LYNN STEADMAN AND STEADMAN LAND & LIVESTOCK, LLC

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LIST AND DESIGNATION OF PARTIES

Pursuant to Rule 24(d), Utah Rules of Appellate Procedure, Petitioners Lynn Steadman, an individual and Steadman Land & Livestock, LLC, will be referred to herein as "Steadman" or "Defendants"; and Respondent Sabrina Rahofy, an individual, will be referred to herein as "Rahofy" or "Plaintiff".

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of Utah Code Ann. § 78A-3-102 (3)(a).

QUESTIONS PRESENTED FOR REVIEW

Pursuant to Rule 51 of the Utah Rules of Appellate Procedure, this Court has granted certiorari as to the following issues:

1. Whether the Court of Appeals misstated or misconstrued the factual background in the course of its evaluation of the issues on appeal;

2. Whether the Court of Appeals erred in reversing the district court's order compelling authorizations and in prescribing procedures for obtaining records from out-of-state third parties.

STANDARDS OF REVIEW

On certiorari, the Utah Supreme Court reviews the decision of the Utah Court of Appeals for correctness. *Magana v. Dave Rock Construction,* 2009, Utah 45, ¶ 19, 215 P. 3d 143.

The standard of review of a trial court's order in matters of discovery is an abuse of discretion. *Gardner v. Board of Cnty Comm'srs, 2008 UT 6, 178 P.3d 893* and *State v. Tanner, 2011 Ut.App. 39, 248 P.3d 61.*

STATEMENT OF THE CASE
Nature of the Case

This lawsuit arises from an automobile accident which occurred on August 7, 2005 in Cedar City, Utah. R. 4. At the time of the accident, Plaintiff was a resident of the State of Illinois and was traveling through Utah. R. 4.

Plaintiff filed suit in the Fifth Judicial District Court, State of Utah, alleging that, as a result of the accident and as a proximate result of Defendants' negligence, Plaintiff sustained significant personal injury, R. 6, disability, R. 7, and damages (including general damages, medical expenses, future medical expenses, future lost income, loss of future earning capacity, lost wages, interest and other damages). R. 7.

Defendant answered Plaintiff's Complaint. R. 16.

Plaintiff filed Initial Disclosures identifying, among other things, the identity of health care providers who rendered treatment to Plaintiff following the accident. R. 26 - 27.

Defendants served Interrogatories, pursuant to Rule 33, Utah Rules of Civil Procedure[1], R. 34, asking Plaintiff to fully disclose all special damages she sustained, all medical expenses and future medical expenses she sustained, all lost wages she claimed, all future losses of earning capacity, and describe all documentation which support her claims. *Interrogatory No. 10.* She was also asked to described in detail all injuries and symptoms she sustained and to identify whether any such injuries or damages pre-dated (or post-dated) the accident. *See Interrogatories No. 11 and 13.* She was asked to identify the physicians

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[1]A copy of Defendant's First Set of Interrogatories to Plaintiff is attached as Addendum 10.

who had treated her prior to the accident. *See, Interrogatory No. 12.* She was asked to identify each medical care provider who had examined or treated her within the prior 20 years and to provide the dates of treatment, the conditions or complaints that led to the treatment, and the results of such treatment. *See, Interrogatory No. 14.* She was also asked to identify all employment she had had within the past 20 years. *See, Interrogatory No. 15.*

Defendant served Requests for Production of Documents, pursuant to Rule 34, Utah Rules of Civil Procedure[2], asking Plaintiff to produce, among other things, each medical report, record, diagnostic study or test, or other document which related to the injuries or symptoms claimed to be caused, aggravated or related to the accident and the cost of each billing. *See Request for Production, Nos. 8, 9 and 10.* She was asked to produce each medical report, record or document pertaining to any pre-existing condition. *See, Request for Production No. 11.* She was asked to produce the documents which support her claim for lost wages, impairment to earning capacity, and her state and federal income tax returns. *See Request for Production No. 12 - 14.* She was asked to produce copies of all documents identified in the Answers to Interrogatories. *See Request for Production No. 20.*

In response to Defendants' interrogatories, Plaintiff identified employers and healthcare providers who had rendered treatment to her before the accident. She indicated that she was in the process of gathering documents in connection with the Request for Production of Documents. She indicated that "She should have the documents within two weeks." R. 70. When documents were not produced by Plaintiff, Defendants forwarded

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[2]A copy of Defendants' First Request for Production of Documents is attached as Addendum 11.

authorizations to Plaintiff which would allow Defendant to obtain the out-of-state employment and medical records. R. 71. Counsel for Plaintiff refused to sign the Authorizations for the release of medical and employment records. R. 72.

When attempts to informally resolve the issue of whether Plaintiff was required to sign the requested authorizations failed, Defendants filed a Motion to Compel asking the trial court to order Plaintiff to sign the authorizations, allowing Defendant to obtain the records directly from the health care providers and employers. R. 66-68. Defendants argued that Rule 26(b)(1), Utah Rules of Civil Procedure, allows a defendant to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. R. 72. Defendants argued that Plaintiff had placed her medical condition in issue and had waived the privilege against production of the documents. R. 76. Defendants argued that, since many of the health care providers and employers were not within the state of Utah, Defendants could not obtain the required information by subpoena issued by a Utah court. R. 73. Defendants cited the trial court to Hales v. Oldroyd, 999 P.2d 588 (Utah App. 2000) (and other cases) wherein the Utah Court of Appeals held that courts are empowered to compel a Plaintiff to execute authorizations to allow defendants to obtain medical records from out-of-state providers. R. 74.

Plaintiff opposed the Motion to Compel, arguing that Plaintiff had already provided "meaningful discovery responses" (by simply identifying the names and addresses of employers and health care providers), R. 87 - 88, that Defendants are not entitled to the requested authorizations to allow them to obtain records from prior health care providers or

employers, R. 88 - 89, that the records sought are privileged , R. 91, and that Plaintiff was not required to sign the requested authorizations for the release of employment records, R. 92 - 93. Plaintiff claimed the records are "irrelevant." R. 93. Plaintiff further argued that she did not possess a copy of her employment records, and stated that it is "unknown whether an employer would release the entire personnel file even if the employee requested it. Defendants have been provided the contact information for the employers. Defendants may contact the employers themselves." R. 94.

Course of Proceedings and Disposition in the Lower Courts

A hearing on Defendant's Motion to Compel was held by the trial court on May 22, 2009. R. 171. After reviewing the memoranda on the Motion to Compel and hearing oral argument from counsel for both parties, the Honorable G. Michael Westfall issued the trial court's Order requiring Plaintiff to execute authorizations for all out-of-state employment records and to provide those authorizations to Defendants. R. 174. The trial Court also ordered Plaintiff to execute authorizations to allow Defendants to obtain the out-of-state medical records identified by Plaintiff. R. 175.

Because of Plaintiff's claim of the sensitive nature of some of the records which might be produced, the trial court outlined a procedure where, if Plaintiff claimed a specific privilege of privacy to specific medical records, the records could be obtained by Plaintiff (not Defendants) and submitted to the trial court for an *in camera* review and determination as to whether Defendants would be entitled to review the records[3].

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[3]A complete copy of the transcript of the parties' oral argument on Defendants' Motion to Compel before the trial court is included as Addendum 8.

On June 19, 2009, Plaintiff filed an *Ex Parte* Motion to Stay Order. R. 178. Plaintiff filed an Interlocutory Appeal to the Utah Court of Appeals. The Utah Court of Appeals reversed the trial court's order granting Defendants' Motion to Compel.

On or about January 6, 2011, Defendants filed a Petition for Writ of Certiorari. On March 29, 2011, the Writ of Certiorari was granted by the Utah Supreme Court.

STATEMENT OF FACTS

1. On August 7, 2006, Plaintiff and Defendant Lynn Steadman were involved in an automobile accident (hereinafter the "Accident") in Cedar City, Utah. Opinion at ¶ 2, R. 3 - 8.

2. At the time of the accident Plaintiff was a resident of Illinois and not a resident of the State of Utah. R. 4.

3. At the time the accident occurred, Plaintiff was on her way to California to start a new job. R. 115.

4. Plaintiff filed suit against Defendants on October 4, 2007, claiming personal injuries as a result of the accident. R. 3-8.

5. Plaintiff alleges she suffered injuries, "including, but not limited to, injury to her right shoulder, left knee, left ankle, right ankle, right leg, right foot, and injury to her upper and lower back. R. 6.

6. Plaintiff alleges that she has "suffered great pain, emotional stress, loss of enjoyment of life," and claims she has suffered "permanent physical injury and disability with a whole body disability rating of 20%." R. 6-7.

7. Plaintiff claims she suffers chronic neck pain since the accident, and is unable to work at the computer for extended periods of time without pain flaring up. She claims that her neck pain interferes with her Yoga practice and flares up when she is sitting for extended periods of time. She claims she is unable to run for long distances and unable to pick up heavy objects. She claims she has pain and pinched nerves between her shoulder blades, which pain interferes with her Yoga. She claims she is unable to do push-ups. She alleges severe panic attacks and alleged mood swings due to inability to teach Yoga at the level she was accustomed to prior to the accident. R. 102.

8. Plaintiff seeks damages for medical expenses, future medical expenses, lost wages, future lost income, and loss of future earning capacity. R. 7.

9. On or about January 14, 2008, Plaintiff filed Initial Disclosures, wherein Plaintiff disclosed a number of health care providers who treated Plaintiff following the accident of August 7, 2006 and referred to an "Independent Medical Evaluation" dated April 4, 2007 by Stuart W. King, M.D., in which Dr. King:

- referred to her past medical history, including "several sports related injuries;"
- referred to her complaints of "occasional back pain and some chiropractic treatment in the past, before the accident;"
- reviewed her work in the past as a "professional dog walker;"
- opines that she will "require chronic pain management for the rest of her life;" and
- assigned a whole person "impairment rating" to Plaintiff of 20%. R. 25-28.

10. In the Initial Disclosures, Plaintiff also referred to an Evaluation of Economic Losses submitted from Dr. Paul H. Randle, wherein Dr. Randle:

- estimated the "present value of the economic losses created as a result of Sabrina's injuries, not including statutory pre-judgment interest, is $724,016.
- Refers to her "normal capacity to earn" as being equal to $17,060 per year; and
- makes other assumptions regarding her claimed lost wages and lost earning capacity. R. 25-28.

11. On January 26, 2008, Defendants served Interrogatories and Requests for Production of Documents on Plaintiff, seeking (among other information) the identity of all health care providers who had rendered medical treatment to Plaintiff within 20 years of the accident. R. 34 - 37.

12. Defendants served Interrogatories, pursuant to Rule 33, Utah Rules of Civil Procedure. R. 34. In the Interrogatories, Plaintiff was asked to:

> 10. State and fully describe all special damages that you are claiming in this lawsuit including but not limited to medical expenses, future medical expenses, lost wages, future losses of earning capacity, etc., and indicate the amounts you are claiming, your method for arriving at each such amount, and describe all documentation in your possession which supports or may refute such claims.
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> 11. Describe in detail all injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by the occurrence.
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> 12. If any of the injuries or conditions for which you claim damages for personal injuries caused by the accident are an aggravation of a preexisting condition, please identify which conditions are an aggravation of a preexisting condition, describe in detail the preexisting conditions, and state the name and address of each medical practitioner who treated you for the preexisting condition, the date of treatment and the nature of such treatment.

13. If you have suffered any aggravation of the symptoms or injuries which you claim from this accident since the time of the accident, please state the date of each such aggravation, the cause of each such aggravation, a detailed description of each aggravation, the names and addresses of all persons who may have witnessed the aggravation, and the names and addresses of all medical practitioners rendering treatment for such aggravations.

14. State the name and address of each medical care provider, including but not limited to, each hospital, psychiatrist, psychologist, mental health agency, mental health therapist, chiropractor, nurse practitioner, physician's assistant, acupuncturist, neuropathologist, massage therapist, or other health care provider who has examined you or treated you during the past 20 years and state the dates of treatment, the conditions or complaints that led to treatment, and the results of such treatment or examinations.

15. With regard to all employment or businesses that you have worked for in the past 20 years, please state the name and address of each employer, the date of commencement and termination, the place of employment, the nature of the duties performed, the name and address of each supervisor, the rate of pay received and the reasons for termination. *See Interrogatories, 10-15.*

13. Defendants also served Requests for Production of Documents, pursuant to Rule 34, Utah Rules of Civil Procedure. R. 36. Plaintiff was asked to produce, among other things:

8. Each and every medical report, medical record, hospital report, or other document which relates to the injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by it.

9. Each and every report of any diagnostic study, test or procedure performed since the accident.

10. Each and every receipt, bill, check, invoice or other document which supports your claim for medical expenses allegedly incurred as a result of this accident.

11. Each and every medical report, medical record, hospital record, hospital report, or other document which relates to any pre-existing condition which you allege was aggravated by the accident.

12. Each and every report or other document which you contend supports your claim for lost time from gainful employment.

13. Each and every document which you contend supports your claim for impairment to earning capacity.

14. Each and every record, written memoranda, copies of Federal or State Income Tax Returns, or other document which purports to show all or any portion of the income received by you for the five years immediately preceding the accident to the present time.

. . . .

20. Please produce each and every document identified in your answers to interrogatories served simultaneously with these requests.

See Interrogatories, No. 8-14, 20.

14. In response to Defendants' Interrogatory number 14 (requesting "the name and address of each medical provider . . . who has examined or treated [Plaintiff] during the past 20 years [and] . . . the dates of treatment, the conditions or complaints that led to treatment, and the results of such treatment or examinations"), Plaintiff identified:

- Dr. D. Dettore, 6827 Stanley Ave., Berwyn, IL 60402. Primary physician for the past 25 years. Plaintiff generally experienced the cold and chronic ear aches;
- Dr. Cecil Brown in Brookfield, IL, Chiropractic care in 1994 for sports related injury to Plaintiff's back;
- Planned Parenthood, 1000 E Washington, Springfield, IL 62703. Gynecological care from 1999 to 2001;
- Women's Health Care Center, 3435 N. Sheffield, Chicago, IL 60657. Gynecological care from 2002 to 2007;
- Woodbridge Health Center, 8580 Cinder Bed Road, Woodbridge, VA 22191. Obstetric care during current pregnancy. R.104.

15. In response to Defendants' Interrogatory number 15 (requesting the name and address of each of Plaintiff's employers for the past 20 years, the hire and termination date for each employer, the nature of her duties performed, the name and address of each supervisor, her pay rate and the reasons for termination), Plaintiff identified 25 employers; 17 of which had employed Plaintiff since 2001. R. 104-105.

16. On May 8, 2008, Defendants sent a letter to Plaintiff's counsel containing authorizations for Plaintiff to execute to allow Defendants to obtain Plaintiff's medical and employment records, since the healthcare providers and employers are not within the State of Utah and not subject to a Utah-issued subpoena. R. 110-111.

17. Plaintiff did not provide any signed Releases for her medical or employment records as requested by Defendants. R. 113.

18. On May 14, 2008, Plaintiff specifically declined to sign authorizations for the release of employment and medical records. R. 72.

19. In a May 21st, 2008 letter, defense counsel again attempted to obtain signed authorizations for release of the records of the entities identified. R. 80-82.

20. On August 15, 2008, due to Plaintiff's refusal to sign any of the authorizations, Defendants filed a Motion to Compel, requesting the trial court to order Plaintiff to sign the authorizations. R. 66-68.

21. On December 8, 2008, oral argument on Defendants' Motion to Compel was scheduled by the trial court. R. 152. Immediately prior to the time of the hearing, counsel for both parties met to discuss the pending motion. During the meeting, counsel believed

they had reached an agreement regarding the production of the documents Defendants sought. Counsel indicated to the trial court that they had reached an agreement on the issue of the production of the records, whereby the medical records of the health care providers and the employment records would be obtained and submitted either to the trial court or a third party (to be agreed upon by counsel). The trial court (or agreed-upon third party) would review disputed medical/employment records to determine which records are reasonably relevant to the case and subject to discovery. The parameters to determine relevance would be stipulated to by counsel. The parties also indicated that, if an agreement could not be reached on particular issues, counsel would re-submit the Motion to Compel for decision by the trial court or request a hearing. R. 158.

22. After the December 8th hearing, despite the preliminary agreement, the parties were unable to reach a formal agreement regarding execution of the authorizations and production of the identified employment/medical records. When informal discussion broke down concerning the accumulation and review of the records, upon notice from counsel, the matter was again presented to the trial court for resolution. The trial court scheduled oral argument on Defendants' Motion to Compel for May 22, 2009. R. 169-170.

23. After considering the Memoranda from the parties on Defendants' Motion to Compel, and after oral argument, the trial court, Honorable G. Michael Westfall ordered:

- Plaintiff shall execute authorizations for all employment records and return the signed authorizations to the defendants . . . on or before June 22, 2009. Defendants were authorized to access any employment records with regard to Plaintiff. R. 174.

- Plaintiff shall provide the Court and Defendants a complete list of every medical service Plaintiff had received – including the date, medical provider, medical problem presented and medical service provided. Plaintiff shall also designate which medical records Plaintiff believes are not relevant to the case and, therefore, subject to privacy. R. 175.

- Defendants were authorized to receive the medical records for those records for which Plaintiff did not claim a continuing privacy privilege. Plaintiff was ordered to either disclose those specific records directly to Defendants or provide a signed authorization for the release of the records to Defendants. R. 175.

- If Plaintiff claimed a continuing privacy privilege or claimed the requested medical records were irrelevant to the issues raised in the litigation, Defendants would have 30 days after receipt of the list of the healthcare providers to object to Plaintiff's claimed continuing privacy privilege, by filing an appropriate motion with the trial court. R. 175.

- In the event Defendants filed the motion with the Court seeking the records, Plaintiff would have 30 days to obtain the records to which continuing privacy privilege was claimed and to submit those records to the trial court for *in camera* review. The trial court would then make a determination as to whether or not the records would be disclosed to defendants. R. 174-175.

23. Plaintiff filed a Petition for Permission to Appeal Interlocutory Order. R. 185.

24. The Utah Court of Appeals issued an Opinion on December 9, 2010, and concluded "Because Defendants could have accessed the requested records without circumventing the discovery rules, the district court abused its discretion in entertaining and granting the Motion to Compel. *Rahofy v. Steadman*, 2010, Utah App. 350, ¶ 12.

25.The Utah Court of Appeals reversed the district court's Order compelling discovery and remanded the case to the district court, claiming the district court "abused its discretion in granting Defendants' Motion to Compel when defendants failed to request documents pursuant to the discovery rules." *Rahofy*, ¶ 14.

SUMMARY OF ARGUMENT

The Utah Court of Appeals misconstrued the factual background in the course of its evaluation of the issues on appeal in this case. First, Plaintiff claimed, for the first time on appeal, that Defendants did not make a formal discovery request for Plaintiff's medical and employment records. Plaintiff previously acknowledged in her brief to the Utah Court of Appeals that this issue was not raised before the trial court. Defendants did formally request Plaintiff's medical and employment records in Defendants' Interrogatories and Request for Production of Documents to Plaintiff.

Second, the Court of Appeals erred in reversing the trial court's order compelling Plaintiff to execute authorizations enabling Defendants to obtain Plaintiff's out-of-state medical and employment records. The trial court, prior to granting Defendants' Motion to Compel, heard all of the relevant background facts, reviewed the procedural history of the case, and correctly determined that Plaintiff should be ordered to execute the authorizations prepared by Defendants. The trial court is in the best position to handle discovery disputes because it is familiar with the issues in the cases before it.

Third, the Court of Appeals, unnecessarily imposed a procedure to obtain out-of-state medical records which is unjust, expensive, burdensome, and overly complicated. Further, even if the procedure outlined by the Court of Appeals were to be followed, many health care providers who will not produce records (even in response to a records subpoena) without a signed authorization from the patient.

Finally, the procedure set forth by the Court of Appeals is not in harmony with prior decisions of Utah courts (as well as courts from other jurisdictions) which have considered the issue of whether a trial court has discretion to order a Plaintiff to execute authorizations.

ARGUMENT

I. THE UTAH COURT OF APPEALS ERRED IN EXPRESSING THE FACTUAL BACKGROUND OF THIS MATTER

Utah Appellate Courts have a long-standing policy of refusing to hear issues raised for the first time on appeal. This case is a classic example of why this policy is so essential See, Moa v. Edwards, 2011 UT App 140, 681 Ut. Adv. Rep. 26, Cannon v. Salt Lake Regional Medical Center, Inc., 2005 UT App 352, 121 P.3d 74 and In re E.R., 2001 UT App 66, 21 P.3d 680.

On appeal, for the first time, Plaintiff argued that Defendants "never made a formal discovery request. . . for the medical or employment records which they seek to obtain through the releases. Furthermore, the Defendants have never made a formal discovery request . . . for the signed releases." Appellant's (Rahofy's) Brief, to the Court of Appeals, p. 28. Plaintiff expressly acknowledged in her brief that these arguments were never raised nor discussed in the trial Court:

> Plaintiff concedes that Rule 37 and its requirements were never discussed in memorandum or argument related to Defendants' Motion to Compel."

Appellant's (Rahofy's) Brief, p. 28.

Nevertheless, Plaintiff claimed that Defendants' alleged failure to formally request pursuant to Rule 34 was "plain error," that the "error is harmful," and that there was a reasonable likelihood of a more favorable outcome for the appellant . . [or the] "confidence in the verdict is undermined." Appellant's (Rahofy's) Brief, p. 29.

The Utah Court of Appeals held that the trial court abused its discretion in granting Defendants' motion to compel when Defendants failed to request documents pursuant to the discovery rules of Rule 34, Utah Rules of Civil Procedure. Rahofy, ¶ 14.

In actuality, Defendants had formally requested the disputed records. In the Interrogatories served on Plaintiff, she was asked to identify:

> 10. State and fully describe all special damages that you are claiming in this lawsuit including but not limited to medical expenses, future medical expenses, lost wages, future losses of earning capacity, etc., and indicate the amounts you are claiming, your method for arriving at each such amount, and describe all documentation in your possession which supports or may refute such claims.
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> 11. Describe in detail all injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by the occurrence.
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> 12. If any of the injuries or conditions for which you claim damages for personal injuries caused by the accident are an aggravation of a preexisting condition, please identify which conditions are an aggravation of a preexisting condition, describe in detail the preexisting conditions, and state the name and address of each medical practitioner who treated you for the preexisting condition, the date of treatment and the nature of such treatment.
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> 13. If you have suffered any aggravation of the symptoms or injuries which you claim from this accident since the time of the accident, please state the date of each such aggravation, the cause of each such aggravation, a detailed description of each aggravation, the names and addresses of all persons who may have witnessed the aggravation, and the names and addresses of all medical practitioners rendering treatment for such aggravations.

14. State the name and address of each medical care provider, including but not limited to, each hospital, psychiatrist, psychologist, mental health agency, mental health therapist, chiropractor, nurse practitioner, physician's assistant, acupuncturist, neuropathologist, massage therapist, or other health care provider who has examined you or treated you during the past 20 years and state the dates of treatment, the conditions or complaints that led to treatment, and the results of such treatment or examinations.

15. With regard to all employment or businesses that you have worked for in the past 20 years, please state the name and address of each employer, the date of commencement and termination, the place of employment, the nature of the duties performed, the name and address of each supervisor, the rate of pay received and the reasons for termination.

16. If you have ever applied for or received disability payments, workers compensation payments, Medicaid benefits, UMAP benefits, or health insurance benefits, please state the name, address and telephone number of each provider that you applied to, the insurance plan or group number used to identify yourself, the dates of the coverage, and sought, whether your claim was granted or denied, and if granted, the nature of benefits received.

17. If you have ever applied for unemployment insurance benefits, please identify the claim number, assigned to each claim you have made, indicate whether you were granted or denied benefits for each claim made, the date of each decision, and the name of the government agency that issued the decision.

18. If you have ever applied for services or benefits from any state or federal agency including but not limited to the Utah State Office of Rehabilitation, Utah State Office of Workforce Services, and the Utah Department of Human Services, please indicate the date and governmental agency you applied for said services or benefits, identify the claim number assigned to each application you made if a claim number was assigned, indicate whether your application for services or benefits was granted or denied, and if granted, describe in detail the kind of services or benefits you have received.

See, Addendum 10, Interrogatories, No. 10-18.

In the Requests for Production of Documents, Plaintiff was asked to produce, among other documents:

8. Each and every medical report, medical record, hospital report, or other document which relates to the injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by it.

9. Each and every report of any diagnostic study, test or procedure performed since the accident.

10. Each and every receipt, bill, check, invoice or other document which supports your claim for medical expenses allegedly incurred as a result of this accident.

11. Each and every medical report, medical record, hospital record, hospital report, or other document which relates to any pre-existing condition which you allege was aggravated by the accident.

12. Each and every report or other document which you contend supports your claim for lost time from gainful employment.

13. Each and every document which you contend supports your claim for impairment to earning capacity.

14. Each and every record, written memoranda, copies of Federal or State Income Tax Returns, or other document which purports to show all or any portion of the income received by you for the five years immediately preceding the accident to the present time.

15. Each and every application, record, written memoranda, report or other document submitted to the governmental agency and/or private provider to support your claim for disability benefits and/or worker's compensation benefits, the decision granting or denying benefits, and if granted, each and every record, written memoranda, report or other document which shows all or any portion of payments received from disability or workmen's compensation.

16. Please provide copies of all health insurance records, claim forms, eligibility cards, or other documents you may have in your possession with respect to all health insurance policies, plans of health insurance, or health insurers in your possession.

17. Please provide copies of all of your unemployment insurance benefit applications, state agency records granting or denying unemployment

> insurance benefits, or other documents you may have in your possession with respect to each and every claim you have made for unemployment insurance benefits with any state agency.
>
> . . . .
>
> 20. Please produce each and every document identified in your answers to interrogatories served simultaneously with these requests.

See, Addendum 11, Request for Production, No. 8-17, 20.

Contrary to the Court of Appeals' decision, Defendants did request documents pursuant to discovery rules. Defendants had served Interrogatories, pursuant to Rule 33 Utah Rules of Civil Procedure and Requests for Production of Documents, pursuant to Rule 34 Utah Rules of Civil Procedure - seeking, among other things, the identity of, and the production of, documents related to her prior health care and employment. R. 34 & 36. Plaintiff submitted some, but incomplete, responsive information and documents. R. 98-107. Defendants then sought by letter[4] and phone calls to have Plaintiff provide more complete responses to the discovery requests (including addresses of disclosed health care providers and former employers) and to provide authorizations to allow Defendants to gather the records from out-of-state former health care providers and former employers directly. R. 110.

Plaintiff objected and refused to provide the authorizations requested - claiming that Plaintiff had already provided all "relevant" documents[5] (medical records generated

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[4]Rule 37(a)(2)(A) requires the parties to confer and attempt to resolve discovery issues without trial court involvement.

[5]Plaintiff contends that she, alone, determines what records are "relevant" and which records are not. R. 89.

subsequent to the accident) R. 85, but objected to the requests to sign authorizations because the authorizations requested records of "five medical providers who had no involvement or relation to the collision." R. 86. Plaintiff also claimed that such a request was improper because the authorizations, in effect, would give Defendants "unfettered access to Plaintiff's entire medical history." R. 89.

Plaintiff never based her objection to the authorizations on the claim the authorizations were not formally served or that she didn't understand what was requested. Rather, the objections were objections of "relevancy, " claims of "unfettered access" to Plaintiff's medical records and to the "scope of records" requested.

Had Plaintiff properly notified counsel or the trial court that she objected to producing the authorizations because they were not formally served (which Defendants claim they were), the trial court could have considered that argument. Defendants could have responded to such claim. If the trial court found that the authorizations were not formally served, and believed there was a requirement to do so, the "defect," (if one existed) could have easily "cured" by simply requiring Defendants to formally serve the authorizations with a Request for Production of the signed authorizations.

Instead, Plaintiff waited until the issue was "on appeal" and the documents designated for appeal had already been identified before raising the issue of an alleged failure to comply with Rules 34 and 37.

Defendants had, in fact, requested the records pursuant to Rule 33 and Rule 34, Utah Rules of Civil Procedure, prior to filing the Motion to Compel with the trial Court. Plaintiff

(and the trial court) clearly understood what records were being requested. The dispute in the trial court was to the scope of the requests; not to the procedure used for the request.

II. THE UTAH COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S ORDER COMPELLING AUTHORIZATIONS AND IN PRESCRIBING COMPLICATED, TIME-CONSUMING, AND EXPENSIVE PROCEDURES FOR OBTAINING RECORDS FROM OUT-OF-STATE THIRD-PARTIES.

The issue of whether a trial court has authority to require a Plaintiff to execute medical and employment authorizations to allow a defendant to obtain out-of-state records is not a new issue to appellate courts.

The trial court, in exercising its discretion, correctly ruled that it had inherent authority to require Plaintiff to execute authorizations to allow Defendant to obtain out-of-state records. One of the issues before this Court is whether the trial court abused its discretion in ordering the execution of such authorizations.

Utah Appellate courts have long held a trial court has broad discretion to handle discovery matters affecting cases before the trial court. "Because the trial judge deals directly with the parties and the discovery process, he or she has great latitude in determining the most efficient and fair manner to conduct the court's business..." A.K. & R. Whipple Plumbing and Heating v. Aspen Const., 1999 UT App 87, ¶ 36, 977 P.2d 518, *rehearing denied, certiorari denied,* 994 P.2d 1271. A trial court has inherent power "to make, modify, and enforce rules for the regulation of the business before [it], to recall and control its process, [and] to direct and control its officers..." Edwards v. Powder Mountain Water and Sewer, 2009 UT App 185, ¶ 21, 214 P.3d 120 (quoting In Re Evans, 42 Utah 282, 130 P.

217, 224 (1913)). The Utah Supreme Court, in Featherstone v. Schaerrer, 2001 UT 86, ¶ 16, 34 P.3d 194 (*rehearing denied*), stated "It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court..." Additionally, Appellate courts grant a trial judge broad discretion in determining how a case should proceed. A trial court's ruling will be overturned only if there is no reasonable basis for the decision. Tschaggeny v. Millbank Ins. Co., 2007 UT 37, ¶ 16, 16 P.3d 615, 619..

In her Opposition to Defendants' Motion to Compel, Plaintiff did not claim that Defendants had failed to seek the records pursuant to Rules 33, 34 and 37 of the Utah Rules of Civil Procedure. Rather, Plaintiff claimed that she did not have the records[6] which had been requested in her possession, R. 94, and thus did not have to produce such records. She claimed that the records requested were irrelevant and "not necessary for the proof of the case." R. 94.

Plaintiff's position regarding discovery in this case is that the only medical records in this case which are relevant are those records which Plaintiff determines are relevant and which reflect treatment Plaintiff received after the subject automobile accident. R. 88-89.

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[6]Plaintiff advised the trial court that she was not in possession of the records and "it is unknown whether an employer would release the entire personnel file even if the employee requested it. Defendants have been provided the contact information for the employers, ***Defendants may contact the employers themselves***." R. 94. ***Emphasis added.***

Plaintiff has also claimed Defendants are not entitled to her employment records because she feels they are "irrelevant".[7]

The trial court recognized that in order to properly defend against Plaintiff's claims, Defendants are entitled to obtain Plaintiff's prior medical and employment records. The trial court further understood that Plaintiff's past medical and employment records are clearly relevant in determining Plaintiff's prior physical condition and employment history, to establish a "base-line" for her health and employment status so as to determine whether there has, in fact, been injury or damage caused. It is also essential to gather such records to determine whether pre-existing conditions are present.

The trial court considered the arguments propounded by Plaintiff regarding relevancy, privilege, and the argument that "Defendants may contact the employers themselves" without authorization, and rejected them. R. 174. The trial court correctly ruled that Defendants are entitled to obtain the medical and employment records of Plaintiff and, insofar as those records are located out-of-state, Plaintiff is required to execute authorizations allowing Defendant to obtain those records.

The Court of Appeals decision mistakenly indicates that "Defendants attempted to avoid the requirements of Rules 34 and 37 by arguing that the authorizations were the only way to access certain records because those records are located outside of Utah." Rahofy, ¶ 11. In point of fact, Defendants did not attempt to avoid Rules 34 and 37 - but sought

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[7]Plaintiff claims her employment records are irrelevant, even though she held seventeen different jobs in a five year period of time and now is seeking $724,000 in economic damages. Appellee's (Steadman's) Brief, p. 20.

discovery pursuant to such rules, including asking the trial court to compel execution of authorizations to allow Defendants to obtain the requested out-of-state records (which Plaintiff claimed she did not have in her possession).

Further, Defendants did not claim the authorizations "were the only way to access certain records because those records are located outside of Utah." Rather, at oral argument before the Court of Appeals, when this issue was first raised, Defendants acknowledged that there were other ways ***to seek*** the requested records - including the process outlined by the Court of Appeals in its decision - but indicated that the procedure outlined by the Court of Appeals was cumbersome, expensive, unnecessary and may, in fact, eventually require the execution of a release even after a subpoena was obtained in the foreign jurisdiction. Counsel indicated that the process suggested by the Utah Court of Appeals would, generally, require retention of additional counsel (counsel licensed to practice in the jurisdiction where the records are located), require the court to obtain jurisdiction over the parties in the foreign jurisdiction, involve the additional costs of filing (and service) of the record-seeking lawsuit in the foreign jurisdiction, and other additional costs. Even after the expenditure of these significant (and unnecessary) expenses and time, oftentimes health care providers nevertheless require a signed authorization from the patient, rather than a subpoena from a court. *See, Addendum 12, letter from Social Security Administration (in an unrelated case)- affirming federal laws which prohibit the release of records, even when served with a subpoena, in the absence of written consent from the individual whose records are being requested.*

Clearly, the trial court was able to exercise its discretion in considering the arguments of counsel, considering the costs of compelling execution of authorizations as compared to incurring the costs of retaining counsel in a foreign jurisdiction, filing another suit (in the foreign jurisdiction), obtaining jurisdiction in the foreign jurisdiction, having the subpoena issued in the foreign jurisdiction, and then actually seeking (via the foreign-issued subpoena) the records and make its decision.

The trial court was well-informed of the issues of obtaining Plaintiff's out-of-state records. Having considered the memoranda by the parties, having heard oral argument by counsel, and having been involved in overseeing this case from its inception, the trial court properly exercised its discretion in ordering Plaintiff to execute the medical and employment records authorizations.

III. THE UTAH COURT OF APPEALS ERRED IN IMPOSING A PROCEDURE TO OBTAIN "OUT-OF-STATE" MEDICAL AND EMPLOYMENT RECORDS WHICH IS UNJUST, UNNECESSARILY COMPLICATED, AND UNNECESSARILY EXPENSIVE.

Rule 1(a) refers to the intent of the Utah Rules of Civil Procedure and states that "They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." See also, W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 738 (Utah 1977).

Applying these principles, the trial court considered the position of the parties, considered the discovery which had been propounded, the responses to discovery which had been provided by Plaintiff, and the requests for the execution of authorizations to obtain out-of-state records. The trial court, who is charged with overseeing discovery disputes,

provided a "just, speedy and inexpensive" way to obtain the records sought - while still allowing a procedure (*in camera* review, if necessary) whereby certain records could be additionally reviewed by the trial court to determine if production is appropriate.

Modern rules of civil procedure are designed to facilitate fair trials with full disclosure of all relevant testimony and evidence. Roundy v. Staley, 1999 UT App 229, ¶ 8, 984 P.2d 404, *certiorari denied,* 994 P.2d 1271. Additionally, rules with respect to discovery must be applied with common sense and within reasonable bounds, consistent with its objective. State ex. rel. Road Comm'n v. Petty, 412 P.2d 914, 917 (Utah 1966). The trial court's Order accomplishes these objectives.

IV. THE PROCEDURE OUTLINED BY THE COURT OF APPEALS IS NOT IN HARMONY WITH OTHER CASES WHICH HAVE CONSIDERED THE ISSUE OF REQUIRING A PLAINTIFF TO SIGN AUTHORIZATIONS.

Utah courts have touched lightly on Motions to Compel plaintiffs to sign authorizations. In Hales v. Oldroyd, 2000 UT App 75, the plaintiff's refusal to sign authorizations for release of medical information resulted in several motions to compel which were granted by the trial court. ¶¶ 4-7. The out-of-state medical providers were beyond the reach of defendant's subpoenas (as in the present case), and the trial court in Hales ordered the plaintiff to sign the authorizations for release of medical information. Id. at ¶ 6.

Courts in other jurisdictions have specifically addressed the practice of requiring a party to sign authorizations allowing a defendant to obtain medical records. In Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183 (Alaska 2009); rehearing denied, March 16, 2009, the Supreme Court of Alaska stated:

> [W]hen a plaintiff's medical privilege has been waived by the filing of suit, "discovery should normally proceed without judicial participation...'in a manner demonstrating candor and common sense.' Requiring a plaintiff to furnish medical releases to her adversaries is one way to accomplish that objective. Further, so doing as an alternative to requiring plaintiff's counsel to produce medical records can result in the discovery of medical records of which plaintiff's counsel is aware. It also eliminates requiring defendants to rely on plaintiff's counsel... "as the gatekeeper for the production of medical records that he considered relevant."
>
> Ayulek, at 1204.

Likewise, the Supreme Court of Florida, in Rojas v. Ryder Truck Rental, Inc., 641 So.2d 855, 857 (Florida 1994), held that a trial court had authority to order a personal injury plaintiff to sign written authorizations for the release of plaintiff's out-of-state medical records and further determined the defendant did not need to file a formal request for production of documents through the party. The Rojas court stated:

> The order [from the trial court] here was well within the power and discretion of the trial court. A trial court possesses broad discretion in overseeing discovery and protecting the parties that come before it. The order entered here accomplishes the discovery of the sought after medical records in the most expeditious and practical way possible, by having the records released directly to the Respondents. It burdens judicial resources the least, and does the most to ensure full disclosure so that defendants in personal injury litigation can fully and fairly litigate their liability. In fact, orders such as this are regularly entered by trial courts, and acquiesced to by plaintiffs.
>
> Furthermore, ordering the Petitioners to sign written authorizations for the release of medical records does not necessitate a violation of their right to protect unrelated, undiscoverable matters. A party, such as the Petitioners, who objects to the disclosure of parts of a medical record is free to request that the entire medical record be submitted to the trial court to review *in camera*. The trial court may then excise or redact the non-discoverable material, if any, prior to releasing the records to the party seeking them.
>
> Rojas, at 857.

The Rojas court further stated:

> We hold that the district court's decision provides the most practical and least burdensome method for obtaining the records at issue and allows for the records to be sent in an expeditious, readable, and uncensored fashion. Equally as important, we find that the procedure for obtaining medical records from an out-of-state or out-of-country source should be no more burdensome than the procedure for obtaining the same type of medical records from an in-state source.
>
> *Id.*

The Indiana Court of Appeals, in Andreatta v. Hunley, 714 N.E.2d 1154 (Ind. App. 1999), held a trial court was within its discretion when it required a slip and fall plaintiff to sign authorizations for defendants to obtain plaintiff's out of state medical records regarding plaintiff's pre and post accident medical treatment. The plaintiff in Andreatta, sought to have the trial court approve a procedure which would have required plaintiff's medical providers to make two copies of all the medical records requested by defendants and allow the plaintiff's counsel to first review the records prior to defendants receiving the records. Only after plaintiff's counsel reviewed the records, if there was no objection, would the medical providers send the second copy of the records to defense counsel. If there was an objection by plaintiff to the records, the medical provider was to segregate the records which were objectionable and send those records directly to the trial court for an *in camera* review. *Id. at 1156.*

The trial court in Andreatta rejected plaintiff's proposed procedure and determined that plaintiff's counsel was aware of plaintiff's prior providers and could have obtained a copy of the records to review by having plaintiff sign an authorization before defendants

sought these records. In upholding the trial court's denial of plaintiff's proposed procedure, the Andreatta court stated "They [plaintiffs] urge us to adopt the tortuous procedure of requiring medical providers to make two copies of all records, number them and send them to counsel. We decline to impose such a procedure upon medical providers or our trial courts..."

Further, the Andreatta court, in holding the trial court was within its discretion in ordering plaintiff to sign medical authorizations for plaintiff's out of state providers, stated:

> Generally, matters concerning discovery methods that the trial rules do not govern are matters for a trial court's exercise of discretion...Because the scope of discovery is highly dependent on the facts of each case, the fact-sensitive nature of discovery issues requires a high degree of deference to the decision of the trial court...We will interfere with the trial court's ruling on discovery matters only where an abuse of discretion is apparent...An abuse of discretion occurs only where the trial court's decision is against the logic and circumstances of the case...
>
> *Id. at 1159 (Internal citations omitted).*

The Andreatta court determined that, since defendants would be unable to issue a subpoena to obtain plaintiff's out-of-state medical records, the trial court acted within its discretion in ordering the plaintiff to sign medical authorizations allowing defendant to obtain those records.[8] *Id.*

In Price v. Grefco, Inc., 543 N.E.2d 521 (Ill. App. 1989), the Illinois Court of Appeals upheld a trial court's order requiring a personal injury plaintiff to execute medical

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[8]The Andreatta court also rejected plaintiff's argument that defendants were not entitled to obtain her prior medical records because they were protected by the physician-patient privilege, and stated "When a patient who is a party to a lawsuit places her physical condition at issue...the patient has impliedly waived the physician-patient privilege as to that condition." Andreatta, at 1157.

authorizations permitting a defendant to obtain plaintiff's out-of-state medical records. The parties in Price agreed that there was no statute or supreme court rule which expressly authorized a court to order a party to execute such an authorization and neither party presented any precedential decision by an Illinois Appellate court dealing with this issue. *Id. at 523.* The Price court determined that the trial court was within its discretion in ordering the plaintiff to execute the authorizations for out-of-state records. *Id. at 523-524.* Further, after the trial court ordered plaintiff to sign the authorizations, she still refused to do so, and the trial court dismissed plaintiff's complaint as a sanction for failure to comply with the trial court's order. The Price court held the trial court was within its discretion in dismissing plaintiff's lawsuit for failure to execute the authorizations as ordered by the trial court. *Id. at 524.*

Likewise, the Supreme Court, Appellate Division, Second Department for the State of New York, in Singh v. Singh, 51 A.D.3d 770, 771, 857 N.Y.S.2d 707, 708-709 (2008), held that a trial court properly exercised its discretion in ordering a plaintiff, in an assault and battery case, to execute authorizations allowing defendants to obtain tax returns filed by plaintiff and his company where plaintiff was claiming damages for lost earnings. *Id. at 771.*

Here, the trial court was well within its authority, in overseeing discovery disputes, to order Rahofy to sign the employment and medical authorizations allowing Defendants to obtain the records directly from the out-of-state health care providers and employers. The trial court's Order was consistent with, and in furtherance of, the direction of the Utah Rules of Civil Procedure to ensure "just, speedy, and inexpensive" determination of the action. Ut.

R. Civ. P. 1(a). The procedure outlined by the Court of Appeals' decision imposes a cumbersome, expensive, time-consuming procedure which undermines the purpose of the discovery rules.

CONCLUSION

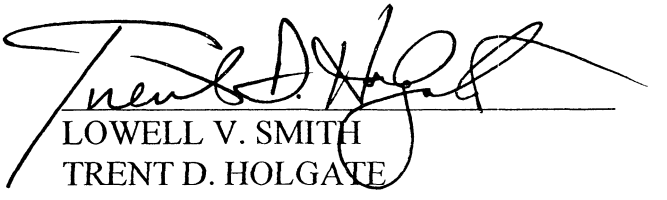
The Utah Court of Appeals erred in expressing the factual background in this case. Specifically, the Court of Appeals determined Defendants had never made a formal discovery request for the medical or employment records of Plaintiff. Plaintiff herself conceded in her brief to the Court of Appeals that "Rule 37 and its requirements were never discussed in memorandum or argument related to Defendants' Motion to Compel." Appellant's (Rahofy's) Brief, p. 28. In point of fact, prior to filing Defendants' Motion to Compel, Defendants did formally request the disputed records in the Interrogatories and Requests for Production of Documents served on Plaintiff.

The Court of Appeals also erred in reversing the trial court's Order compelling Plaintiff to execute authorizations and in setting forth discovery procedures for obtaining Plaintiff's records from out-of-state third parties. Trial courts have broad discretion in handling the discovery issues which come before them. The Honorable G. Michael Westfall, in the present case, after considering the arguments made by Plaintiff, correctly granted Defendants' Motion to Compel and ruled Defendants are entitled to obtain signed authorizations for the release of Plaintiff's medical and employment records. The trial court considered the costs of compelling authorizations compared to incurring the costs of

retaining counsel in a foreign jurisdiction, filing another suit in a foreign jurisdiction, having subpoenas served in the foreign jurisdiction, then obtaining the records in the foreign jurisdiction. The procedure imposed by the Court of Appeals to obtain the out-of-state medical and employment records is unjust, overly complicated, and unnecessarily expensive.

Finally, the procedure set forth by the Court of Appeals to obtain out-of-state records is contrary to previous decisions by Utah Appellate courts, as well as courts in other jurisdictions which have determined a trial court has discretion to order a personal injury plaintiff to execute records authorizations.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **BRIEF OF PETITIONERS LYNN STEADMAN AND STEADMAN LAND & LIVESTOCK, LLC** was served upon the following by mailing two copies thereof, postage prepaid, to the addresses shown before this 17th day of June, 2011.

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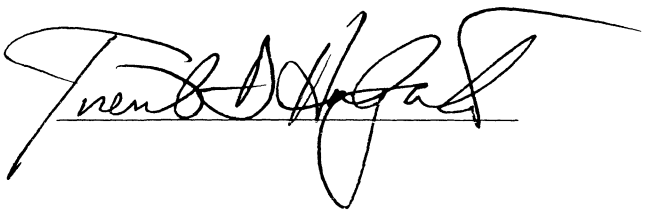

ADDENDUM

1. Rule 1, Utah R. Civ. P.
2. Rule 26 (b)(1), Utah R. Civ. P.
3. Rule 33, Utah R. Civ. P.
4. Rule 34, Utah R. Civ. P.
5. Rule 37, Utah R. Civ. P.
6. Rule 51, Utah R. App. P.
7. Court of Appeals Opinion, *Rahofy v. Steadman,* 2010 UT App 350
8. Transcript of Oral Argument before Trial Court on Defendants' Motion to Compel
9. Trial Court's Order On Defendant's Motion to Compel
10. Defendants' First Interrogatories to Plaintiff
11. Defendants' First Request for Production of Documents
12. Letter from Social Security Administration

Tab 1

Rule 1. General provisions.

(a) Scope of rules. These rules shall govern the procedure in the courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Advisory Committee Notes

Tab 2

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(a)(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(b)(3) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney,

consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) Trial preparation: Experts.

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(6) Claims of Privilege or Protection of Trial Preparation Materials.

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b)(6)(B) Information produced. If information is produced in discovery that is subject to a

claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and

the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these

rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were

pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

Advisory Committee Notes

Tab 3

Rule 33. Interrogatories to parties.

(a) Availability; procedures for use. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(3). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26 (d).

(b) Answers and objections.

(b)(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(b)(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(b)(3) The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories. A shorter or longer time may be ordered by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(b)(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(b)(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Advisory Committee Notes

Tab 4

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope. Any party may serve on any other party a request

(a)(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(a)(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure.

(b)(1) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

(b)(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(b)(3) Unless the parties otherwise agree or the court otherwise orders:

(b)(3)(A) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(b)(3)(B) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(b)(3)(C) a party need not produce the same electronically stored information in more than one form.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Advisory Committee Notes

Tab 5

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, , unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure as are just, including the following:

(b)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B)prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(b)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party;

(b)(2)(D) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or

the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court . on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26 (e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

Tab 6

Rule 51. Disposition of petition for writ of certiorari.

(a) Order after consideration. After consideration of the documents distributed pursuant to Rule 50, the Supreme Court will enter an order denying the petition or granting the petition in whole or in part. The order shall be decided summarily, shall be without oral argument, and shall not constitute a decision on the merits. The clerk shall not issue a formal writ unless directed by the Supreme Court.

(b) Grant of petition.

(b)(1) Whenever an order granting a petition for a writ of certiorari is entered, the Clerk of the Supreme Court forthwith shall notify the Clerk of the Court of Appeals and counsel of record.

(b)(2) If the record has not previously been filed, the Clerk of the Supreme Court shall request the clerk of the court with custody of the record to certify it and transmit it to the Supreme Court.

(b)(3) The clerk shall file the record and give notice to the parties of the date on which it was filed and the date on which petitioner's brief is due.

(b)(4) Rules 24 through 31 shall govern briefs, argument, and disposition of the petition for writ of certiorari. In applying Rules 24 through 31, the petitioner shall stand in the place of the appellant and the respondent in the place of the appellee. In lieu of providing the citation or statements required by Rules 24(a)(5)(A) and (B), the statement of the issues presented for review as required by Rule 24(a)(5) shall include, for each issue, a statement and citation showing that the issue was presented in the petition for certiorari or fairly included therein.

(c) Denial of petition. Whenever a petition for a writ of certiorari is denied, an order to that effect will be entered, and the Clerk of the Supreme Court forthwith will notify the Court of Appeals and counsel of record.

Tab 7

245 P.3d 201, 671 Utah Adv. Rep. 9, 2010 UT App 350
(Cite as: 245 P.3d 201)

Court of Appeals of Utah.
Sabrina RAHOFY, Plaintiff and Appellant,
v.
Lynn STEADMAN, an individual; and Steadman Land & Livestock, LLC, Defendants and Appellees.

No. 20090512–CA.
Dec. 9, 2010.

Background: Automobile accident plaintiff appealed decision of the District Court, Cedar City Department, G. Michael Westfall, J., granting defendants' motion to compel production of documents relating to medical treatment she received for the injuries she allegedly suffered as a result of the accident.

Holding: The Court of Appeals, Christiansen, J., held that order granting defendants' motion to compel was improper.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿961

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k961 k. Depositions, affidavits, or discovery. Most Cited Cases
The Court of Appeals reviews the district court's decision to grant or deny a motion to compel discovery under the abuse of discretion standard, and the Court of Appeals will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling.

[2] Courts 106 ⚿85(3)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(3) k. Construction and application of particular rules. Most Cited Cases
The interpretation of a rule of procedure is a question of law..

[3] Courts 106 ⚿85(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(2) k. Construction and application of rules in general. Most Cited Cases
The Court of Appeals will interpret court rules according to their plain language.

[4] Pretrial Procedure 307A ⚿402

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)4 Proceedings
307Ak402 k. Time for application; condition of cause. Most Cited Cases

Pretrial Procedure 307A ⚿403

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)4 Proceedings
307Ak403 k. Request, notice, or motion and response or objection. Most Cited Cases
Order compelling defendants' requests for production of automobile accident plaintiff's medical and employment records before defendants had

formally requested the documents was abuse of discretion; defendants did not establish that they served plaintiff with a document request in compliance with rule authorizing production of documents, they did not describe the items requested "with reasonable particularity," but instead broadly requested every document contained in plaintiff's medical and employment records, they did not attempt to establish that the documents being requested were in plaintiff's "possession, custody or control", and without circumventing the discovery rules, they could have accessed the requested records through power of subpoena. Rules Civ.Proc., Rules 34, 37.

[5] Pretrial Procedure 307A ⚿24

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak24 k. Discovery methods and procedure. Most Cited Cases
Defendants must establish their entitlement to production of documents using the proper procedures. Rules Civ.Proc., Rules 34, 37.

[6] Pretrial Procedure 307A ⚿334

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)1 In General
307Ak334 k. Persons subject. Most Cited Cases

Pretrial Procedure 307A ⚿403

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)4 Proceedings
307Ak403 k. Request, notice, or motion and response or objection. Most Cited Cases
When documents are in the possession of a third party, the subpoena procedure can be used to obtain those documents and documents located in another state may be obtained by utilizing the subpoena procedure in that state. Rules Civ.Proc., Rule 45(a)(1)(C)(iii).

[7] Pretrial Procedure 307A ⚿24

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak24 k. Discovery methods and procedure. Most Cited Cases
If a party objects to informal methods of discovery, the party requesting the documents must take steps pursuant to recognized procedural rules to obtain the relief allowed in the rules of discovery. Rules Civ.Proc., Rules 34, 37.

[8] Pretrial Procedure 307A ⚿24

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak24 k. Discovery methods and procedure. Most Cited Cases
The discovery process is intentionally broad and is designed to be simple and efficient. Rules Civ.Proc., Rule 26(b)(1).

*201 Jamis M. Gardner and Thomas W. Seiler, Provo, for Appellant.

Lowell V. Smith and Trent D. Holgate, Sandy, for Appellees.

Before Judges DAVIS, VOROS, and CHRISTIANSEN.

*202 OPINION

CHRISTIANSEN, Judge:

¶ 1 We granted plaintiff Sabrina Rahofy's interlocutory appeal to determine whether the district court abused its discretion in granting defendants Lynn Steadman and Steadman Land & Livestock,

LLC's motion to compel. We reverse and remand.

BACKGROUND

¶ 2 This litigation concerns an automobile accident that occurred in 2005 near Cedar City, Utah. Rahofy provided initial disclosures, which included the medical information relating to the medical treatment she received for the injuries she allegedly suffered as a result of the accident, and answered Defendants' interrogatories.[FN1] Then, in an attempt to obtain all of Rahofy's past medical and employment records not directly related to the accident, which were located outside of Utah, Defendants sent Rahofy two letters in which they requested she sign authorizations to have the records released directly to Defendants.[FN2] When Rahofy refused to sign the authorizations to release all of her past medical and employment records, Defendants filed a motion to compel and argued that she should sign the authorizations because the records are relevant, that without the authorizations "Defendants cannot obtain the required information," and that the records are not privileged because Rahofy has put her medical and employment histories at issue.[FN3]

FN1. Although Rahofy's initial interrogatory answers did not contain the addresses of some of her former employers, she later provided those addresses to Defendants.

FN2. Defendants requested that Rahofy sign general releases to send to *all* of the medical providers she had seen in the last twenty years and *all* of Rahofy's prior employers so that Defendants could obtain directly from those providers and prior employers *all* of Rahofy's medical and employment records.

FN3. In their motion to compel, Defendants also argued that Rahofy had not fully responded to a rule 33 interrogatory asking for the addresses of Rahofy's former employers. However, Defendants had overlooked the fact that Rahofy had later provided this additional information. Thus, Defendants acknowledged in their reply brief for their motion to compel that the interrogatory had been completely answered. Had Rahofy not answered the interrogatory, the district court, in its discretion, could have properly entertained Defendants' motion to compel and could have required Rahofy to answer the interrogatory. *See* Utah R. Civ. P. 33, 37(a)(2)(B). However, because a complete answer had been given to Defendants before the district court addressed the motion, the motion to compel was not based on an insufficient interrogatory answer and is, therefore, not an issue on appeal.

¶ 3 Rahofy responded to Defendants' motion by arguing that she had completely answered all formal discovery requests; that the request to sign the authorizations was an informal request; that had the request been made as a production of documents request, Rahofy "would object [to the request] as vague, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence"; that Defendants failed to prove the records were in Rahofy's possession, which was required for her to produce them; that the medical records were privileged; and that neither the medical nor the employment records were relevant in this case.

¶ 4 After a hearing, the district court granted Defendants' motion to compel. Concerning Rahofy's employment records, the district court determined that "Defendants may access any employment records" and ordered Rahofy to "execute authorizations for all employment records and return the signed authorizations to the Defendants" within eleven days after the order was filed.[FN4] With regard to Rahofy's medical records, the district court ordered Rahofy, within eleven days,

FN4. In fact, the district court ordered Rahofy "to execute a release so [D]efendant[s] can access any employment records that they want to access with regard to [Rahofy] back to when she was

> selling ... Girl Scout cookies when she was nine-years old.... [Defendants] can access ... any employment records they want."

to provide to the Court and to the Defendants a complete list of every medical record [Rahofy] has ever had generated on her behalf, including the date, medical provider, medical problem presented and medical service provided.[[FN5] The list provided*203 to the Court and to the Defendants must be accurate, or the Court may impose sanctions. [Rahofy] is to designate which of the medical records listed, [she] believes are not relevant to this case and therefore, subject to privacy.

> FN5. The district court placed the burden on Rahofy to obtain and disclose all of the requested medical records, even those records that were not in Rahofy's possession:
>
> > [I]f [Rahofy] doesn't have the copy of the record in [her] possession, ... [she] simply gather[s] the information by calling and talking to the healthcare provider, then [she] is required to sign a release to release those records.... I'm going to throw the onus of the burden back on [Rahofy] with regard to those medical records, and require that [she] gather the information....
>
> Moreover, the district court placed no limits on how far back Rahofy must go to obtain records or what type of medical records she was to provide:
>
> > You have 30 days to provide the list of every visit, and as I indicated—what was it, every visit, the date of every visit, the medical problem that was presented and the service that was provided.... That may very well require that she admit that she had hemorrhoids and went to a doctor for it....
>
> Defendants shall be entitled to receive medical records for those records to which [Rahofy] does not claim a privacy privilege. [Rahofy] is either to disclose those specific records directly to Defendants, or, if [Rahofy] does not have a copy of a specific record in her possession, [she] is required to sign an authorization for release to release those specific records.
>
> Regarding [Rahofy]'s designation of health care providers which [she] claims are privileged and irrelevant to the issues raised in this litigation, Defendants have 30 days after receipt of the list of health care providers which [Rahofy] claims are irrelevant and subject to privacy, to object to [Rahofy]'s designation by filing a motion with the Court.
>
> In the event that Defendants file a motion with the Court, [Rahofy] will have an additional 30 days to obtain all such records from the various health care providers and submit all such records to the Court. The Court will review these records *in camera,* and make a determination as to whether or not they are to be disclosed.
>
> (Emphasis in original.) We granted Rahofy's interlocutory appeal to determine if the district court abused its discretion in entertaining and granting Defendants' motion to compel.

ISSUE AND STANDARD OF REVIEW

¶ 5 Rahofy challenges the district court's order that granted Defendants' motion to compel. More specifically, Rahofy argues that because Defendants did not formally request the medical and employment records pursuant to rule 34 of the Utah Rules of Civil Procedure, a motion to compel, which requires a formal request, was not proper. Moreover, Rahofy argues that the district court abused its discretion in granting the motion to compel because the records and information sought were not relevant, were privileged, and were not in her possession.[FN6]

> FN6. Both Rahofy and Defendants argue

> about the relevance and privileged status of the requested records. While these substantive issues may eventually need to be determined, we review only whether the proper *procedures* were followed to entitle Defendants to a motion to compel the production of those items in the first place. Defendants provided very little legal or factual arguments, either at the district court or on appeal, regarding whether they followed the proper procedures pursuant to rules 34 and 37 of the Utah Rules of Civil Procedure. Because we determine that Defendants did not follow the proper procedures, we do not reach the merits of the other issues Rahofy raises on appeal.

[1][2][3] ¶ 6 We review the district court's decision to grant or deny a motion to compel under the abuse of discretion standard. *See Cannon v. Salt Lake Reg'l Med. Ctr., Inc.*, 2005 UT App 352, ¶ 7, 121 P.3d 74. "[W]e 'will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling.' " *Id.* (citation omitted). "[T]he interpretation of a rule of procedure is a question of law," *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540, and "[w]e interpret court rules ... according to their plain language," *Staley v. Jolles*, 2010 UT 19, ¶ 14, 230 P.3d 1007 (internal quotation marks omitted). *See also Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 18, 238 P.3d 1035 ("When we interpret a procedural rule, we do so according to our general rules of statutory construction.").

***204** ANALYSIS

¶ 7 The Utah Rules of Civil Procedure provide that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Utah R. Civ. P. 26(b)(1). The rules outline a procedure through which parties involved in litigation can obtain a broad range of discoverable items. *See, e.g., id.* R. 33, 34. "The Utah Supreme Court has stated that the general purpose of discovery is 'to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible.' " *Cannon*, 2005 UT App 352, ¶ 8, 121 P.3d 74 (quoting *Ellis v. Gilbert*, 19 Utah 2d 189, 429 P.2d 39, 40 (1967)). "[T]he purpose of the rules of civil procedure pertaining to discovery 'is to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities....' " *Id.* (citation omitted). Although the rules expressly allow parties to agree to informal discovery procedures, *see* Utah R. Civ. P. 29(2), the discovery rules, in the absence of such an agreement, set forth a procedure to effectuate an efficient discovery process.

¶ 8 The Utah Rules of Civil Procedure allow a trial court to grant a motion to compel discovery, *see id.* R. 37(d), if a party has not adequately responded to a discovery request made in the form of interrogatories, *see id.* R. 33, or a request for production of documents, *see id.* R. 34. *See also Toma v. Weatherford*, 846 F.2d 58, 60 (10th Cir.1988) (interpreting substantially similar federal rule 37 and stating that " Rule 37(a)(2) gives a requesting party under Rules 33 or 34 a specific remedy for failure to answer interrogatories or requests for production: a motion for an order compelling an answer").

¶ 9 Rule 34 requires that a party requesting documents must serve the request, which describes "with reasonable particularity" the item or items requested, Utah R. Civ. P. 34(b)(1), and that the requested documents must be "in the possession, custody or control of the party upon whom the request is served," *id.* R. 34(a)(1). Rule 34 also allows the party receiving the request to make proper objections if the receiving party believes that the documents are protected. *See id.* R. 34(b)(2). Any objections must be specific and made within thirty days. *See id.* Furthermore, all requests, responses, and objections must be signed by an attorney certifying that the request is made in compliance with Utah's

laws and rules, that the request is not "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," and that the request is "not unreasonable or unduly burdensome or expensive, given the needs of the case." [FN7] *Id.* R. 26(g).

> FN7. One party may question the motives of the other party's refusal to produce documents as an attempt to hide discoverable information. However, when the rules of procedure are followed, an attorney's signature certifies that the objection is made for a proper purpose. *See* Utah R. Civ. P. 26(g). This allows the trial court to impose sanctions if the objection or delay was improper. *See id.* By sending letters rather than a formal document request, not only did Defendants not have to certify that the request was made for a proper purpose, but Rahofy's objections were also not certified as being for a proper purpose. *Cf. Barnard v. Mansell,* 2009 UT App 298, ¶ 8, 221 P.3d 874 (mem.) (discussing the different implications of signing a motion for sanctions as opposed to signing a warning letter).

[4] ¶ 10 The parties agree that Defendants requested Rahofy's medical and employment records through letters.[FN8] Defendants did not establish before the district court that the letters in which they requested the authorizations be signed were valid requests for documents under rule 34 of the Utah Rules of Civil Procedure. First, Defendants did not establish, or even attempt to establish, before the district court that they ***205** served Rahofy with a document request in compliance with the rule, *see id.* R. 34(a)(1). On appeal, Defendants suggest that the letters were properly served, but no record cite or legal authority was presented to establish this claim. Second, Defendants did not describe the items requested "with reasonable particularity," *id.* R. 34(b)(1), but instead broadly requested every document contained in Rahofy's medical and employment records. Finally, Defendants did not even attempt to establish before the district court that the documents being requested were in Rahofy's "possession, custody or control." *Id.* R. 34(a)(1). In fact, Defendants have consistently acknowledged, and the district court likewise acknowledged in its order, that some of these documents were not in Rahofy's possession but in the possession of people or entities located outside of Utah. Therefore we conclude that the district court abused its discretion by granting the motion to compel before Defendants had formally requested the documents under the rules.[FN9]

> FN8. We note that the record contains Defendants' certificate of service for their request for production of documents from Rahofy. However, the actual request, which presumably contained a list of documents requested that did not include the documents subsequently requested by their letters, is not part of the record. Nevertheless, neither party claims that Defendants requested that Rahofy sign the medical and employment authorizations other than through the letters. Therefore, we consider only whether Defendants' letters satisfied the requirements of rule 34.

> FN9. We do not separately analyze rule 33 because Defendants were clearly requesting that Rahofy facilitate the production of documents, which request would not fall under rule 33 but, rather, under rule 34.

[5] ¶ 11 Defendants attempted to avoid the requirements of rules 34 and 37 by arguing that the authorizations were the only way to access certain records because those records are located outside of Utah. While ultimately they may be entitled to such records,[FN10] Defendants must establish their entitlement using the proper procedures. *See Brown v. Glover,* 2000 UT 89, ¶ 30, 16 P.3d 540 ("[A]n attorney has a responsibility to use the available discovery procedures to diligently represent her client. The Utah Rules of Civil Procedure provide the

means to do this.").

> FN10. Because of the procedural deficiencies in this case, we make no determination as to whether the medical and employment records are relevant or privileged. We also need not make any determination as to the appropriate method for obtaining authorizations for release of records except as stated herein.

[6] ¶ 12 When documents are in the possession of a third party, the subpoena procedure can be used to obtain those documents. *See* Utah R. Civ. P. 45(a)(1)(C)(iii) (stating that a subpoena "command[s] each person to whom it is directed ... to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain"); *see also id.* R. 34(c) (stating that the rule for production of documents "does not preclude an independent action against a person not a party for production of documents"). Documents located in another state may be obtained by utilizing the subpoena procedure in that state. Defendants seek records located in Virginia, Illinois, and Hawaii. Although these states differ in their procedure, each allows for the subpoenaing of records located in their state.[FN11] We readily acknowledge that to obtain*206 all of the information Defendants seek they may have to undertake a time-consuming and expensive process. However, because Defendants could have accessed the requested records without circumventing the discovery rules, the district court abused its discretion in entertaining and granting the motion to compel.

> FN11. Virginia has adopted the Uniform Interstate Depositions and Discovery Act, *see* Va.Code Ann. §§ 8.01–412.8 to –412.15 (2010), which Utah has also adopted, *see* Utah Code Ann. §§ 78B–17–101 to –302 (2008). Virginia allows a subpoena obtained from another state to be served in Virginia if "a written statement that the law of the foreign jurisdiction grants reciprocal privileges to citizens of [Virginia] for taking discovery in the jurisdiction that issued the foreign subpoena." Va.Code Ann. § 8.01–412.10(A). The subpoena can be used to produce designated documents and records, *see id.* § 8.01–412.12, and once a party files the subpoena, it is "served in compliance with the applicable statutes of" Virginia, *id.* § 8.01–412.11. If Rahofy were to challenge the subpoena, she could file for a protective order or a motion to quash or modify the subpoena in a Virginia court. *See id.* § 8.01–412.13.
>
> Illinois and Hawaii have not adopted the uniform act. In Illinois, a subpoena may be issued for an action pending in a court of another state. *See* Ill. Sup.Ct. R. 204(b). Although the Illinois rule limits the subpoena power to depositions, Illinois case law has extended the subpoena power to other discovery allowed under Illinois rules. *See Eskandani v. Phillips,* 61 Ill.2d 183, 334 N.E.2d 146, 153 (1975); *Mistler v. Mancini,* 111 Ill.App.3d 228, 67 Ill.Dec. 1, 443 N.E.2d 1125, 1128 (1982); *see also* 735 Ill. Comp. Stat. Ann. 5/2–1003(a) (LexisNexis 2010) (determining scope of discovery in personal injury cases). Hawaii has a somewhat more onerous procedure for obtaining a subpoena that begins with hiring an attorney licensed in Hawaii for the limited purpose of filing a miscellaneous action. *See generally* Haw.Rev.Stat. Ann. § 624–27 to – 28 (LexisNexis 2010); Victoria Bushnell, *How to Take an Out–of–State Deposition,* 14 Utah Bar J. 28, 30 (2001). Although subpoenaing out-of-state records is not as simple as having the opposing party sign an authorization releasing those records, Defendants have argued that a great deal of money is involved in

this case. Thus, like all discovery and litigation decisions, Defendants will need to weigh the need for the information against the time and expense of obtaining it. *See* Victoria Bushnell, *How to Take an Out–of–State Deposition,* 14 Utah Bar J. 28, 30 (2001).

[7][8] ¶ 13 We note that this opinion in no way discourages parties from cooperating in informal discovery procedures such as the use of an authorization or a waiver of privilege. In fact, it may be advantageous for parties to agree to more limited requests in exchange for the release of only certain documents to expedite the litigation process and reduce expenses. [FN12] That being said, if a party objects to informal methods of discovery, the party requesting the documents must take steps pursuant to recognized procedural rules to obtain the relief allowed in our rules.

FN12. We remind counsel that the discovery process is intentionally broad and is designed to be simple and efficient. *See* Utah R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter ... which is relevant to the subject matter involved in the pending action.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."); *Cannon v. Salt Lake Reg'l Med. Ctr., Inc.,* 2005 UT App 352, ¶ 8, 121 P.3d 74. Without the open exchange of relevant information between parties, the purpose of the discovery rules will be frustrated and litigation will become costlier than it already is. If there is relevant, nonprivileged information located in Rahofy's past medical and employment records, Defendants are entitled to it if they properly request it, subject to the subpoena procedure of other states.

CONCLUSION

¶ 14 We reverse and remand because the district court abused its discretion in granting Defendants' motion to compel when Defendants failed to request documents pursuant to the discovery rules.

¶ 15 WE CONCUR: JAMES Z. DAVIS, Presiding Judge and J. FREDERIC VOROS JR., Judge.

Utah App.,2010.
Rahofy v. Steadman
245 P.3d 201, 671 Utah Adv. Rep. 9, 2010 UT App 350

END OF DOCUMENT

Tab 8

IN THE FIFTH JUDICIAL DISTRICT COURT
OF IRON COUNTY, STATE OF UTAH

SABRINA RAHOFY, Plaintiff, vs. LYNN STEADMAN, et al, Defendant.	Case No. 070500807 PI

Hearing
Electronically Recorded on
May 22, 2009

BEFORE: THE HONORABLE MICHAEL G. WESTFALL
Fifth District Court Judge

APPEARANCES

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20090512-CA

PROCEEDINGS

(Electronically recorded on May 22, 2009)

THE COURT: The matter before the Court is the motion to compel in the case of Sabrina Rahofy vs. Lynn Steadman and Steadman Land and Livestock, Inc., case No. 070500807. Who do we have appearing?

MR. SMITH: Your Honor, Lowell Smith for the defendants.

THE COURT: Okay.

MR. GARDNER: Jamis Gardner for the plaintiff.

THE COURT: Okay. I was hoping, gentlemen, that we could reach an agreement with regard to this. Apparently that hasn't happened. The defendant has asked me to rule on this motion without a hearing, but the plaintiff requested a hearing. So what else did the plaintiff want to tell me that would justify everybody showing up here today, Mr. Gardner?

MR. GARDNER: Your Honor, we just felt like this was an important issue related to the plaintiff's privacy, and that the issues in this, we wanted to fully argue before the Court in addition to just what the pleadings have presented. That's why we felt like we wanted to argue this fully because of the privacy issues that are at risk.

We have already provided all of the medical records that we believe we have in our possession that relate to the collision, and what they are asking for is beyond that. We felt like it was necessary to underline that issue with the Court.

THE COURT: Okay. So what else do you want to present me today -- to me today?

MR. GARDNER: Well, your Honor, we just want to reiterate some of the facts that -- first of all, in their objection to the request for a hearing, they represent to the Court that our last offer -- or that our position was that we wanted the records to be sent to us first and then we would send them to them. What we had thought we had agreed to at the last hearing was that we would -- the records would be sent to your Honor or a third party, and they would decide what was relevant, and then they'd send those to the defendant. So it wasn't like we were just withholding that.

So in their objection they've either misunderstood what we thought we had agreed to or mischaracterized that agreement. So we just wanted to clarify that we believed the context of this is crucial in that the case law that they have cited in Jackson v. Kennecott, there are four factors that they must show, and they fail the first three. They have failed to show that these documents are relevant. They have failed to show that they are in our possession, and they've failed to show that they are relevant to the case.

We've already -- like I said, we've provided them what -- everything we believe to be related to the collision, and if they need to go a few years back, that's normally what we do in these cases. What they've asked for is gynecological records

from when she was 19-years-old. How is that relevant to her accident and some injury -- left wrist injuries and some back injuries. That's not relevant. That's not important to this case. How is it relevant that when she was 16 she worked at McDonald's? Why do they need personnel files or those records to determine whether or not as a 31-year-old she is now competent or whatever as the -- in the real estate profession and needs that information to go forward.

So the case that they have cited, they have failed it. I believe, your Honor, that the most important factor is that, you know, this is a type of issue that has already come before a district court, and unfortunately the judge who had it the first time around didn't have the opportunity of prior existing case law, and so that got appealed.

We don't need to go through that process because the Supreme Court in 2008 just reviewed this issue. They said in the Barbuto case -- Sorensen v. Barbuto, 2008, "Rule 506(d)(1) does not mean that the patient has consented to the disclosure of his entire medical history. Rule 506 is only broad enough to allow the disclosure of information relevant to an element of any claim or defense. Therefore, it is a limited waiver of privilege, confined to court proceedings, and restricted to the treatment related to the condition at issue."

So this is an issue that's already been decided for your Honor, and the Supreme Court has gone over it with specific

reference to these type of medical requests that are beyond what has been asked for. They didn't -- the defendants haven't actually made that clear in their memorandums because they've just -- memoranda. They've said, "We've requested these records; they didn't give them to us." Well, we gave them everything we believe to be relevant, but now they want more than that.

That is where that limit of waiver of privilege applies. So we believe that our client does not need to be subjected to her medical records being reviewed by defendants simply because she filed a lawsuit related to an accident. Why her gynecological records or obstetric records, or why she -- when she had a cold when she was nine, how that is relevant to this case.

THE COURT: Okay. All right. What else do you want to bring to my attention?

MR. GARDNER: Just that, your Honor, in State vs. Cardall, the last -- the last point I'd like to make, in State v. Cardall, if they make a general request, which they've made here, just a general request for the records from these doctors, they -- the plaintiff still holds the privilege. She gets to make that decision whether those are going to be released, if they're not related to the treatment, the condition at issue. So she has made the decision, and as Counsel we've consulted on that, and that's -- the decision is final, according to the Utah Supreme Court in 1999. That decision is final.

Now if they can -- if they -- it says, "Unless defense

Counsel becomes aware that other exculpatory evidence was withheld and brings it to the attention of the Court, the decision is final." Now if they make specific requests, then the case law suggests that we give it to the Court, the Court reviews it in camera and then gives it to the defense. That's what we offered, which that's -- we don't believe they're entitled to that, because they haven't made a specific request, but we were willing to provide that, even though it wasn't a specific request.

Based on what they're asking, it's a general request, and that's the point. So the -- when they first sent us these requests for authorization, it related to the employment records going back to when she was 16. Tom Seiler, who is with our office, and he's been on the board of governors right now with the UAJ, the Utah Association for Justice, which was the Utah Trial Lawyer's Association. When we received those he sent a letter and said, "Can you point me to a statute or a case law that you believe entitles you to that information, because I've never seen that, and I'd like to look at that and know why it is you believe you're entitled to employment records related to a car accident."

You know, we've given them tax returns. We can look for W-2's if we haven't already given those and provide what we need to, but the case law in Utah is specific already in this -- on this case. It's already been decided. So we believe it should

be an easy decision for the Court because it can look at the precedents in this Utah court and not need to worry about later appeals because the Court's already decided this issue.

In their reply memorandum, the defendants raise this issue of good cause, that we have failed to provide good cause for why we didn't provide these documents. First of all, privacy is always a good cause. Second of all, they've just then attempted to shift the burden.

We don't have that burden. They've not cited a single case that mentions the words "good cause." They have the burden to show that the documents are relevant, in our possession and necessary to the case, according to their own case law they've cited, and that's just the generic case law, let alone the specific case law on records related to privilege that are a limited privilege, and our client has not released that privilege.

So your Honor, we would ask that the Court deny the motion, that we not be forced to sign these authorizations for release. If the Court does feel like the defendant is entitled to some of these records, we would still ask that they be submitted to the Court for in camera review, and then the defense can have whatever you believe to be relevant.

THE COURT: Thank you. Mr. Smith, do you want to respond?

MR. SMITH: I would, your Honor. Thank you very much

for taking the time to hear us today. In a letter from Mr. Gardner dated February 9th, 2009, here's the way he interpreted the Court's order last time we met. "Plaintiff will submit the authorizations to the respective employers and direct that the employers provide the employment records to Counsel for plaintiff. Plaintiff will submit the authorizations to the respective medical provider, and direct the medical provider provide the medical records to Counsel for the plaintiff. Plaintiff will review the records and provide those records to defendants, which plaintiff believes to be reasonably likely to lead to discoverable evidence."

We don't believe that the medial records should be filtered through the plaintiff's office, and that he should have the opportunity of deciding unilaterally what's relevant and what's not relevant.

When we were here before, we indicated that we would request the records, we would get them, but before we would use them in a hearing or a proceeding, we would try and agree upon whether or not they were relevant. If we could not agree, then those records would be presented to the Court. We did not anticipate, and we did not expect the job to be transferred to the Court to receive all the medical records and go through and review those.

We're officers of the Court. We're not going to distribute these records all over. We're going to take a look at

the records that are there to determine whether they're relevant or not.

Let me just address the relevancy matter. In their answers to interrogatories, they identified five healthcare providers that were out of state. For one of those, a Dr. Brown, they specifically referred to the fact that he treated her for a sports related injury to plaintiff's back. In this case, plaintiff is claiming injury to her shoulder, knee, ankle, upper and lower back. We're clearly entitled to get these records to determine what her condition was like before the accident, what injuries were caused by the accident, and what the residuals have been after.

When we were here before we talked about the medical records, and we agreed that we would not seek the McDonald's records, nor the records when she was dog walking, but all of the other authorizations would be executed. We would receive those records again, to determine what her claim for lost wages is.

Now it's important to note that of the 25 employers that she identified in her answers to interrogatories, she's had 17 employers since 2001. That clearly would be relevant about an earning history, what kind of job she had, why she was employed, why she was let go, why she changed employment.

This is a personal injury action where she has placed her health in issue, and she's made a claim for lost wages where she has put in issue her earning and her earning capacity.

Normally we would subpoena those records, but the scope of the subpoena does not go out of the state. So typically in these kind of cases we have the plaintiff execute releases and authorizations; we then obtain those records.

This case has been pending since -- the accident happened August 7th, 2005. Suit was filed October 2nd, 2007, and we have been trying since we filed our answer to gather this information so we could move this matter forward. We have prepared the case management order, which then has fallen off track because we've had these discovery disputes.

We would recommend to the Court that the Court issue its order that the plaintiff execute the releases and authorizations, that those records come to us. We're happy to provide an exact copy of everything we get to Mr. Seiler and Mr. Gardner. If we can't agree on how those records are going to be used at trial or in motions or in other discovery efforts, at that point we could involve the Court to look at the relevancy. We're clearly entitled to gather the records. We're entitled to review them in order the evaluate the claims.

I think this is a -- and part of the reason we asked that we not come down for a hearing was because we thought we had resolved all these issues before, and maybe there was just a misunderstanding as to how the Court was going to rule. But we're happy to be here, and I'm happy to answer any questions, if the Court has any.

THE COURT: Okay. Thank you.

MR. SMITH: Thank you.

THE COURT: It isn't your motion. You're defending the motion, but I let you speak first. Is there anything else you want to bring to my attention?

MR. GARDNER: Your Honor, if the requests had been specified -- you know, Mr. Smith brings up the back doctor. It was 11 years prior to the accident, but arguably I can see the argument for why that particular record might be relevant. But they presented all of these, 25 employers and five doctors -- McDonald's included, dog walking, and gynecological records.

So it wasn't -- they didn't ask us to go through and tell us which ones we would sign. They said, "Sign these 25, sign these five." So we've had to defend against all 30 of these authorizations for release. If they had limited it or we -- to the back doctor or the recent real estate professional that she's in, maybe we can reach an agreement, but when it's all 30, and we've already provided them the information of wages, employment, position, they can use that information to present to the jury, "Look, she's been employed at 17 different places since she was -- since 2001." They can depose her about why she wasn't there or why she left.

The personnel files from all those people are not relevant, and there's no statute or law that says they're entitled to all those personnel records when we're dealing with

a per -- a car accident and her future loss of earning. In all these cases -- we did tax returns and W-2's, and then the experts argue about how much she could make. So we've had to defend against all of these because that's the request that was made to us -- or rather, the demand. So based on that, we've had to defend against this.

THE COURT: All right. Thank you. First of all, with regard to the employment records, I can't see any reason why the plaintiff -- why the defendant shouldn't have access to whatever the defendant wants to spend the time looking for. They may very well be wasting their time, but it's their time they're wasting.

So within 30 days of today's date the plaintiff is required to execute a release so the defendant can access any employment records that they want to access with regard to the plaintiff back to when she was selling cookies when she was -- Girl Scout cookies when she was nine-years-old. You're right, it may never come before the jury, but I don't know that until I see it. So that -- you're required to do that within 30 days, execute that release. They can access any healthcare -- or excuse me, any employment records they want.

With regard to the medical care records, this is what I'm going to rule. Within 30 days the plaintiff is to provide to the Court and to the defendant a complete list of every medical record the plaintiff has ever had generated on her behalf with the date, the doctor and the medical problem that was presented,

and the service that was provided. You don't have to go into any detail, but just that much information.

Then within -- also within that 30 days, the plaintiff is required to designate which of those records the plaintiff believes are not relevant to the case, and therefore should be subject to the plaintiff's privacy right and not disclosed. Any other records not so designated are either to be disclosed, or if the plaintiff doesn't have the copy of the record in their possession, and you know, they simply gather the information by calling and talking to the healthcare provider, then they are to -- the plaintiff is required to sign a release to release those records -- those specific records.

With regard to the items that are in the list that the plaintiff claims should not be disclosed, the defendant then has 30 days thereafter to file a motion with the Court to review those records and decide whether or not they're relevant. Then if that motion is filed, then the plaintiff has the responsibility to gather all of those records, and the plaintiff has a responsibility to have those records available so that I can review them.

I fully agree with the plaintiff's position that there may be records that are irrelevant and shouldn't be disclosed, but I don't know that until I see them. The defendant doesn't know what additional information they want -- may want to find, what additional discovery they might want to engage in until we

find out what's there.

I'm going to throw the onus of the burden back on the plaintiff with regard to those medical records, and require that the plaintiff gather the information, submit the information, and then with regard to those records that they don't want to produce, gather the records, in the event the defendant then files a request that any of those specific records be disclosed. Do both Counsel understand my order?

MR. SMITH: I think we -- I do, your Honor.

MR. GARDNER: I think so, your Honor. Just for clarification, those five medical providers, we don't have any of their records right now. So for her to -- she's just going to have to go from her memory and call them, like you say. So she's -- I'm just saying --

THE COURT: You have 30 days to provide the list of every visit, and as I indicated -- what was it, every visit, the date of every visit, the medical problem that was presented and the service that was provided, without going into any detail. That may very well require that she admit that she had hemorrhoids and went to a doctor for it, but that's where we're at. I don't -- if there were disclosures made, obviously we don't make -- we're not going to get into those disclosures at this point.

Then once you provide that list, then the burden shifts to the defendant to go through that list and say, "I want -- I

believe that this record is something the Judge should look at," and then they designate those records. They have 30 days to do that. Once those are presented to you, then -- and a motion is filed, then you -- I'm going to give you an additional 30 days to gather the records and provide them to the Court, and then I will look at them in camera and make a determination as to whether or not they ought to be disclosed.

MR. GARDNER: I just wanted to confirm that in that 30 days, I don't think it's reasonable that we'll be able to get the actual records, but she's going to do her best to provide them.

THE COURT: Yeah, you have 90 days, essentially, to get the records, if my math is right. You have 30 days to designate the records -- well, and then they have 30 days to designate which ones they want you to -- that they think that should be pro -- they think should be produced that you don't want to produce, and I guess they could do that in five days if they want. But then you have from that time -- that notice is provided, you have an additional 30 days to gather all of those records and submit them to the Court.

MR. GARDNER: I just mean in that first 30 days.

THE COURT: Right. No, I understand.

MR. GARDNER: It will be based on what she can remember.

THE COURT: Yeah, you'll have at least 60 days to gather whatever records need to be presented to me so I can determine whether they should be presented to the -- produced to the

defendant.

MR. SMITH: Your Honor, I understand it's just not what she can remember. She has to take some affirmative action to contact the doctors and find out what those --

THE COURT: That's correct. That is -- it's her responsibility. Since she wants to protect that privacy interest, and we don't know, you don't know, I don't know if there really is a privacy interest to be protected, she has the burden of gathering that information and providing it. If she doesn't, then I may very well impose some sanctions, which could be fairly serious in this case.

I realize that the plaintiff's position is that all of this information should be filtered through the plaintiff, and I just disagree with that. I -- the plaintiff is not the appropriate -- plaintiff's Counsel is not the appropriate party to filter whether or not -- to provide the filtering process to determine whether evidence is or is not relevant. That's simply not the plaintiff's Counsel's prerogative.

MR. GARDNER: I just want to -- just trying to clarify to that first 30-day list may not be based on actual records, but will be based on her homework that she's doing to get that list and calling the doctors, but I don't know that we'll be able to get the actual records for that first 30-day list.

THE COURT: Well, and if I -- and I'm not saying that you have to have the actual records, but the information that you

provide better be accurate, because if it's not, then I may very well impose some sanctions because I -- this has been going on long enough. I'd hoped that you'd be able to resolve it. This essentially stalls the case. You know, I'd like to see this issue get resolved.

Mr. Smith, can you prepare an order for my signature?

MR. SMITH: Thank you, your Honor. I will.

THE COURT: All right. I hope that I've made it clear enough. Let me see if there is anything else.

MR. SMITH: May I suggest to the Court that we may need to submit an amended case management order, but we'll work together to prepare that.

THE COURT: See if you can work that out. All right. Thank you.

MR. SMITH: Thank you very much.

THE COURT: That's all in that matter, and that concludes the matters on the Court's 9 o'clock calendar.

MR. SMITH: Have a nice weekend, your Honor.

THE COURT: Thank you.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

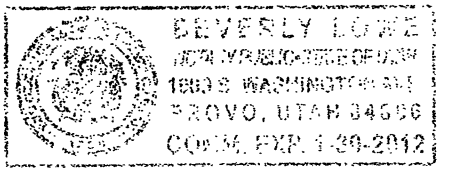
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this _____ day of _____ 2009.

My commission expires:
January 30, 2012

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 9

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Telephone: (801) 562-5555
Attorneys for Defendants

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SABRINA RAHOFY, an individual, Plaintiff, v. LYNN STEADMAN, an individual, and STEADMAN LAND & LIVESTOCK, LLC., Defendants.	:	**ORDER ON DEFENDANTS' MOTION TO COMPEL** Civil No. 070500807 Judge G. Michael Westfall

This matter having come before the Court on the Defendants' Motion to Compel, and having reviewed the memoranda in the matter, and having heard arguments thereon, the Court finds and orders as follows:

ORDER

1. The Plaintiff shall execute authorizations for all employment records and return the signed authorizations to the Defendants by and through their counsel of record on or before June 22, 2009. Defendants may access any employment records with regard to the plaintiff.

2. On or before June 22, 2009, the plaintiff is to provide to the Court and to the Defendants a complete list of every medical record the plaintiff has ever had generated on her behalf, including the date, medical provider, medical problem presented and medical service provided. The list provided to the Court and to the Defendants must be accurate, or the Court may impose sanctions. Plaintiff is to designate which of the medical records listed, plaintiff believes are not relevant to this case and therefore, subject to privacy.

3. Defendants shall be entitled to receive medical records for those records to which Plaintiff does not claim a privacy privilege. Plaintiff is either to disclose those specific records directly to Defendants, or, if the Plaintiff does not have a copy of a specific record in her possession, Plaintiff is required to sign an authorization for release to release those specific records.

4. Regarding Plaintiff's designation of health care providers which Plaintiff claims are privileged and irrelevant to the issues raised in this litigation, Defendants have 30 days after receipt of the list of health care providers which Plaintiff claims are irrelevant and subject to privacy, to object to Plaintiff's designation by filing a motion with the Court.

5. In the event that Defendants file a motion with the Court, Plaintiff will have an additional 30 days to obtain all such records from the various health care providers and submit all such records to the Court. The Court will review these records *in camera*, and make a determination as to whether or not they are to be disclosed.

DATED this 11th day of June, 2009.

BY THE COURT

HONORABLE G. MICHAEL WESTFALL
Fifth Judicial District Court Judge

Approved as to form:

ROBINSON, SEILER & ANDERSON, LC

Jamis M. Gardner 6/8/09
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this _____ day of _____, 2009, to:

Jamis M. Gardner
ROBINSON, SEILER & ANDERSON, LC
2500 N. University Ave.
P.O. Box 1266
Provo, UT 84603-1266
Attorneys for Plaintiff

_____

Tab 10

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Attorneys for Defendants

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SABRINA RAHOFY, an individual, Plaintiff, v. LYNN STEADMAN, an individual, and STEADMAN LAND & LIVESTOCK, LLC., Defendants.	**DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFFS** Civil No. 070500807 Judge G. Michael Westfall

COME NOW the Defendants, Lynn Steadman and Steadman Land & Livestock, LLC, and in accordance with the provisions of Rule 33, Utah Rules of Civil Procedure, submits herewith the following interrogatories to be answered by the Plaintiffs under oath and within thirty (30) days of the date of service hereof.

INSTRUCTIONS FOR USE

All information is to be divulged which is in the possession of the individual or corporate party, attorneys, investigators, agents, employees or other representatives of the named party and their attorney.

A "health care provider" as used in these interrogatories is meant to include any medical doctor, osteopathic physician, psychiatrist, psychologist, mental health therapist, nurse practitioner, nurses assistant, acupuncturist, neuropathologist, massage therapist, podiatrist, doctor of chiropractic, naturopathic physician, or other person who performs any kind of healing art.

Where an individual interrogatory calls for an answer which involves more than one part, each part of the answer should be clearly set out so that it is understandable.

Where the terms "you", "plaintiff", or "defendant" are used, they are meant to include every individual party and separate answers should be given for each person named as a party, if the answers are different.

Where the terms "accident" or "the accident" are used, they are meant to mean the incident which is the basis of this lawsuit, unless otherwise specified.

These interrogatories shall be deemed continuing so as to require further and supplemental answers should the Plaintiff receive additional pertinent information between the time the answers are served and the time of trial.

INTERROGATORIES

1. Identify yourself by stating the date and place of your birth, your social security number, all names that you have ever gone by, and the dates for which you have gone by each such name.

2. State each and every address which you have had in the last ten (10) years, the dates of your residence at each, and identify all individuals who resided with you at each such address.

3. Set forth your marital history including the dates and places of each marriage, the name, address and phone number of each spouse and former spouse(s) and the date, place and manner of termination of each marriage.

4. State the name, birth dates and addresses of each of your children.

5. State your social security number.

6. If you have ever been a party to a lawsuit or have made a personal injury claim before, please state the date for each lawsuit or claim, the nature of each lawsuit or claim, the names and addresses of all parties involved in the lawsuit or claim, and describe the disposition of the lawsuit or claim.

7. If you have ever been convicted of a felony or misdemeanor involving honesty, such as theft, please state the date of the conviction, the place of the conviction, and the charge(s) for which you were convicted.

8. Please state the name, address, phone number, and employer of each person who may have or claims to have knowledge of the accident or any of the events leading up to it or related events occurring thereafter.

9. Please identify and describe whether any recorded statements, photographs, video footage, drawings, diagrams, tests, inspections, measurements, or investigations were made or performed regarding the accident scene, any of the objects involved in the accident, or any of the persons involved in the accident, and describe the item prepared or done, indicate the date such item was taken or prepared, and the name and address of the person in possession of each such item.

10. State and fully describe all special damages that you are claiming in this lawsuit including but not limited to medical expenses, future medical expenses, lost wages, future losses of earning capacity, etc., and indicate the amounts you are claiming, your method for arriving at each such amount, and describe all documentation in your possession which supports or may refute such claims.

11. Describe in detail all injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by the occurrence.

12. If any of the injuries or conditions for which you claim damages for personal injuries caused by the accident are an aggravation of a preexisting condition, please identify which conditions are an aggravation of a preexisting condition, describe in detail the preexisting conditions, and state the name and address of each medical practitioner

who treated you for the preexisting condition, the date of treatment and the nature of such treatment.

13. If you have suffered any aggravation of the symptoms or injuries which you claim from this accident since the time of the accident, please state the date of each such aggravation, the cause of each such aggravation, a detailed description of each aggravation, the names and addresses of all persons who may have witnessed the aggravation, and the names and addresses of all medical practitioners rendering treatment for such aggravations.

14. State the name and address of each medical care provider, including but not limited to, each hospital, psychiatrist, psychologist, mental health agency, mental health therapist, chiropractor, nurse practitioner, physician's assistant, acupuncturist, neuropathologist, massage therapist, or other health care provider who has examined you or treated you during the past 20 years and state the dates of treatment, the conditions or complaints that led to treatment, and the results of such treatment or examinations.

15. With regard to all employment or businesses that you have worked for in the past 20 years, please state the name and address of each employer, the date of commencement and termination, the place of employment, the nature of the duties performed, the name and address of each supervisor, the rate of pay received and the reasons for termination.

16. If you have ever applied for or received disability payments, workers compensation payments, Medicaid benefits, UMAP benefits, or health insurance benefits,

please state the name, address and telephone number of each provider that you applied to, the insurance plan or group number used to identify yourself, the dates of the coverage, and sought, whether your claim was granted or denied, and if granted, the nature of benefits received.

17. If you have ever applied for unemployment insurance benefits, please identify the claim number, assigned to each claim you have made, indicate whether you were granted or denied benefits for each claim made, the date of each decision, and the name of the government agency that issued the decision.

18. If you have ever applied for services or benefits from any state or federal agency including but not limited to the Utah State Office of Rehabilitation, Utah State Office of Workforce Services, and the Utah Department of Human Services, please indicate the date and governmental agency you applied for said services or benefits, identify the claim number assigned to each application you made if a claim number was assigned, indicate whether your application for services or benefits was granted or denied, and if granted, describe in detail the kind of services or benefits you have received.

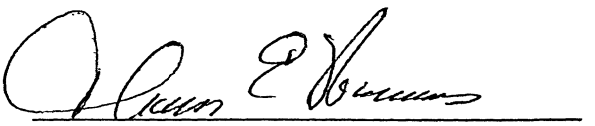
19. Please state the first date following the accident when you consulted with or sought the legal advice of an attorney.

20. State the name, address and phone number of each witness you may call to testify at the time of trial and set forth a detailed description of the expected testimony and indicate if the witness may be qualified as an expert and if so, set forth the expert's facts,

opinions, qualifications, rate of pay, and all other items to be disclosed as described in Rule 26 of the Utah Rules of Civil Procedure.

DATED this 24th day of January, 2008.

SMITH & GLAUSER, P.C.



LOWELL V. SMITH
THOMAS E. STAMOS
Attorneys for Defendants

Tab 11

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Attorneys for Defendants

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SABRINA RAHOFY, an individual, Plaintiff, **v.** LYNN STEADMAN, an individual, and STEADMAN LAND & LIVESTOCK, LLC., Defendants.	**DEFENDANTS' FIRST REQUEST FOR PRODUCTION OF DOCUMNETS** Civil No. 070500807 Judge G. Michael Westfall

COME NOW the Defendants, and in accordance with the provisions of Rule 34, Utah Rules of Civil Procedure, submits herewith the following Request for Production of Documents. These requests are to be responded to by Plaintiffs within thirty (30) days of the date of service at the office of Smith & Glauser, 1218 East 7800 South, Suite 300, Sandy, Utah 84094. If objection is made to any request, or any part thereof, you are hereby requested to set forth with particularity the specific objection as to each part.

INSTRUCTIONS FOR USE

All documents are to be produced which are in the possession of the individual or corporate party, his attorneys, investigators, agents, employees, or other representatives of the named party and his attorney. The terms "accident" or "the accident" are meant to include the incident which is the basis of this lawsuit, unless otherwise specified.

The terms "you," "plaintiff" or "defendant" are meant to include every individual party. Full and separate responses should be given for each named person as a party, if requested.

The term "document" is meant to include, but is not limited to, all writings, notes, memoranda, correspondence, charts, graphs, records, tapes, pictures, recorded, photographed, sketched, drawn or otherwise produced, maintained or stored information.

REQUESTS FOR PRODUCTION

Produce:

1. A copy of your driver's license, permit or certificate, which authorizes you to operate a motor vehicle.

2. Each and every written or recorded statement made by any party or witness.

3. Each and every photograph or motion picture taken of the accident scene or of any objects or person involved in the accident.

4. Each and every drawing or diagram of the scene of the accident or of any object involved in the accident which you intend to use during the trial of the action.

5. Each and every report of any tests, inspection, or measurement made or taken with respect to the accident scene or any object involved.

6. Each and every report of any investigation conducted concerning the accident in question.

7. A curriculum vitae of each and every person who is skilled in a particular field or science, whom you may call as a witness during the trial of this action, and who has expressed an opinion upon any issue in this action.

8. Each and every medical report, medical record, hospital report, or other document which relates to the injuries and symptoms, whether physical, mental or emotional, experienced since the occurrence and claimed to have been caused, aggravated, or otherwise contributed to by it.

9. Each and every report of any diagnostic study, test or procedure performed since the accident.

10. Each and every receipt, bill, check, invoice or other document which supports your claim for medical expenses allegedly incurred as a result of this accident.

11. Each and every medical report, medical record, hospital record, hospital report, or other document which relates to any pre-existing condition which you allege was aggravated by the accident.

12. Each and every report or other document which you contend supports your claim for lost time from gainful employment.

13. Each and every document which you contend supports your claim for impairment to earning capacity.

14. Each and every record, written memoranda, copies of Federal or State Income Tax Returns, or other document which purports to show all or any portion of the income received by you for the five years immediately preceding the accident to the present time.

15. Each and every application, record, written memoranda, report or other document submitted to the governmental agency and/or private provider to support your claim for disability benefits and/or worker's compensation benefits, the decision granting or denying benefits, and if granted, each and every record, written memoranda, report or other document which shows all or any portion of payments received from disability or workmen's compensation.

16. Please provide copies of all health insurance records, claim forms, eligibility cards, or other documents you may have in your possession with respect to all health insurance policies, plans of health insurance, or health insurers in your possession.

17. Please provide copies of all of your unemployment insurance benefit applications, state agency records granting or denying unemployment insurance benefits, or other documents you may have in your possession with respect to each and every claim you have made for unemployment insurance benefits with any state agency.

18. Please provide copies of each and every application that you have submitted for services or benefits from any state or federal agency including but not limited to the Utah State Office of Rehabilitation, Utah State Office of Workforce Services, and the Utah

Department of Human Services, copies of any and all other documents and records in your possession relating to each and every claim you have made, and if you have received any services or benefits from any agency, a copy of all documents and records relating to the services or benefits you have received.

19. Please provide copies of any and all video footage or photographs of plaintiff taken since the day of the accident underlying your complaint.

20. Please produce each and every document identified in your answers to interrogatories served simultaneously with these requests.

21. Please produce each and every document which you may introduce into evidence at the time of trial.

22. Please produce any and all calendars, daytimers or appointments you may have for the past five years.

23. Please produce any and all cell phone records including but not limited to itemized billed and call records for the 30 days preceding the accident and for the 30 days following the accident.

24. Please produce any and all credit card statements from the date of the accident to the present time.

25. Please produce any and all e-mail records for the year following the accident that in any way discuss the accident or the property where it occurred.

DATED this 22nd day of January, 2008.

SMITH & GLAUSER, P.C.

LOWELL V. SMITH
THOMAS E. STAMOS
Attorneys for Defendants

Tab 12

SOCIAL SECURITY

1001 17th Street
Denver, Colorado 80202

VIA TELEFACSIMILE

Smith & Glauser, P.C.
1218 East 7800 South, Suite 300
Sandy, UT 84094

RE: [redacted] - Case No. 09[redacted] Second Judicial District Court, County of Davis, State of Utah-Subpoena Social Security Records from Canyon Medical Solutions for [redacted]

Dear Mr. Wright:

We are writing in response to the subpoena you caused to issue in the above referenced case. The subpoena purportedly requires [redacted] LLC in Salt Lake City, UT to appear on or before February 15, 2011 at the offices of Smith & Glauser and produce records for [redacted] works as a contractor of Social Security, and therefore the records they possess are Social Security Administration records. We are unable to comply with the subpoena for the following reasons:

Federal statutes and regulations prohibit the Social Security Administration (SSA) from disclosing the contents of its records in the absence of written consent from the individual(s) whose records are being requested.[1] Release of such records in the absence of the individual's written consent could result in civil and criminal penalties. See 5 U.S.C. §552 (b)(6); 5 U.S.C. §552a(b); 42 U.S.C. §1306; 20 C.F.R. §401.100 et. seq. Because the subpoena in this case was not accompanied by the appropriate consent, we are unable to produce any records pursuant to the subpoena.

Second, under the regulations at 20 C.F.R. Part 403 (see 66 Fed. Reg. 2805 (2001)), an employee of SSA may not testify voluntarily or involuntarily, as part of his or her official duties, in litigation to which the United States or a Federal agency is not a party without the prior authorization of the Commissioner of Social Security or his designee. See, e.g., Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197 (11th Cir. 1991)

[1] Such consent must: (1) be directed specifically to SSA; (2) specify the records that may be disclosed, to whom the disclosure may be made, and the length of time the consent is effective; and (3) be signed and dated by the individual.

("[D]epartment heads [may] promulgate regulations restricting employee testimony in private litigation.") (citing United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)). Such authorization could not be received by November 24, 2010 and, in fact, is rarely given. "SSA maintains a policy of strict impartiality with respect to private litigants and seeks to minimize the disruption of official duties." 20 C.F.R. § 403.100 (66 Fed. Reg. at 2809).

If you wish to pursue this matter, you must file a written application. See 20 C.F.R. § 403.120 (66 Fed. Reg. at 2810). The application must:

- Describe in detail the nature and relevance of the testimony sought in the legal proceeding;
- Include a detailed explanation as to why you need the testimony, why you cannot obtain the information you need from an alternative source, and why providing it to you would be in SSA's interest; and
- Provide the date and time that you need the testimony and the place where SSA would present it.

Id. In addition, you must state the date and time when you need the testimony and the location where the testimony will be presented. You must submit the application at least 30 days in advance of the date when you need the testimony, or provide a detailed explanation as to why the application is not timely and why it is in SSA's interest to review the untimely application. The application for testimony must be mailed to:

Office of the General Counsel
Social Security Administration
Office of General Law
ATTN: Touhy Officer
P.O. Box 17779
Baltimore, MD 21235-7779

We have enclosed a copy of the consent form used by SSA. Please note that there is a separate consent required for earnings records. Once an appropriate consent and request for records is received from each individual, copies of the requested records will be forwarded to your office. Please be aware, however, that retrieval and transmission of the folder may require up to 6 months.

Federal statutes provide that copies of any records or other documents in Social Security, when authenticated under the Agency seal, shall be admitted in evidence equally with the originals thereof. See 42 U.S.C. §3505. Rather than appear for the deposition, we will be glad to certify the documents.

If you have any questions please contact Shayla Hadley at (303) 844-2346.

Sincerely,

For

Robert Jandrlich
Assistant Regional Commissioner
Management and Operations Support

Enclosure
cc: [redacted] Salt Lake City, UT
cc: [redacted] Salt Lake City, UT